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Inherent Aboriginal Rights in Theory and Practice: The Council for Yukon Indians Umbrella Final Agreement

by

Floyd William McCormick ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

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Floyd McCormick

Unit 15, 5 Klondike Road
Whitehorse, Yukon
Y1A 3L7

January 23, 1997

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled: **Inherent Aboriginal Rights in Theory and Practice: The Council for Yukon Indians Umbrella Final Agreement** submitted by **Floyd W. McCormick** in partial fulfillment of the requirements for the degree of DOCTOR OF PHILOSOPHY.

Gurston Dacks
Dr. Gurston Dacks (Supervisor)

Ian Urquhart
Dr.Ian Urquhart

Tom Pocklington
Dr. T. Pocklington

Michael
Dr. M. Asch, Department of Anthropology

Dr. M. Dickerson, University of Calgary

Jan 20, 1997
Date

Abstract

This thesis explains the connection between the concept of inherent aboriginal rights, and the outcome of aboriginal claims negotiations. The focus is on both the outcome of negotiations and the process: the issues raised by inherent rights arguments, and how these issues are, or are not, addressed.

The questions to be answered include: what does it mean to refer to an aboriginal right as an *inherent* right ? and, how is inherent rights discourse employed in claims negotiations ? Answering these and other questions will involve articulating the concept of inherent aboriginal rights, and analyzing the Council for Yukon Indians (CYI) Umbrella Final Agreement (UFA) to determine the degree to which its provisions fulfil the logical requirements of inherent aboriginal rights. This will indicate the effect of inherent rights arguments on the outcome of negotiations.

Inherent rights arguments are not, however, the only factor that affects claims negotiations. Five other factors: the negotiating position of the CYI, events at the national level which affected federal government policy, the position of the Yukon Government, the negotiating process, and the imbalance of political power between the three parties will also be explored.

The conclusion drawn in this thesis is that the effect of inherent aboriginal rights discourse on the outcome of claims negotiations is indirect. This discourse has become more prominent since negotiations began in 1973 and increasingly formed part of the political context in which the UFA was negotiated.

However the UFA does not explicitly acknowledge the rights of Yukon First Nations (YFNs) as inherent rights. These rights are to be bounded by the Constitution of

Canada, including the *Charter of Rights and Freedoms*. On the other hand the aboriginal rights and title of YFNs are not extinguished.

This philosophical saw-off occurred for two reasons. The first is that the parties approached the negotiations from different philosophical starting points. Therefore any agreement would necessarily be a compromise. The second reason is that the parties focused on resolving practical problems. The need to engineer agreements which would be practical, workable, and acceptable to Yukoners - and not a quest for philosophical harmony - drove the negotiations.

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"It takes a whole lotta help to make it on your own"

- Steve Forbert

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Floyd William McCormick
January 1997

Table of Contents

Release Form

Title Page

Approval Page

Abstract

Table of Contents

Acknowledgements

Acronyms

Chapter One

Introduction page 1
- The Question and its Significance page 4
- Research Design and Data page 5
- A Note on Terms page 8

Chapter Two

Inherent Aboriginal Rights page 9
- Review of the Literature page 9
- Constructing a Theory of Inherent Aboriginal Rights page 13
- Inherent Aboriginal Rights as a Rights Argument page 32
- Practical Considerations page 39
- A Critique of Inherent Aboriginal Rights page 42
- Conclusion page 46

Chapter Three

The Council for Yukon Indians Umbrella Final Agreement page 50
- The Umbrella Final Agreement: Process page 51
- The Umbrella Final Agreement: Content page 57
  - Land page 58
  - Financial Compensation page 60
  - Political Rights page 63
- The Umbrella Final Agreement and Inherent Rights page 65
- Conclusion page 71

Chapter Four

The Effect of Rights Discourse and the Outcome of the UFA Negotiations page 73
- Avoiding Theoretical Arguments page 74
- The Legal Basis of the CYI Claim page 76

Putting Rights Arguments Aside page 81
The Objective of Negotiations page 82
Rights Arguments at the Negotiating Table page 84
Theoretical Arguments and Claims Negotiations page 90
Conclusion page 93

Chapter Five

Non-Rights Factors and the UFA Negotiations page 96
The Position of the CYI page 96
Events at the National Level page 104
The Position of the Government of the Yukon page 139
The Principled Negotiations Process page 151
The Imbalance of Political Power page 161
Conclusion page 177

Chapter Six

Conclusions page 180
Summary page 180
Conclusion page 185
The Future of Inherent Aboriginal Rights page 191
Final Thoughts on the Inherent Rights Approach page 197
An Agenda for Further Research page 197

Sources

Published Books and Articles page 201
Unpublished Materials page 209
Court Cases Cited page 209
Government Documents page 209
Council for Yukon Indians Documents page 211
Agreements page 211
Land Claims Secretariat files page 212
Personal Interviews page 215
Video Recordings page 217

List of Acronyms Used

ADM: Assistant Deputy Minister.

AFN: Assembly of First Nations.

AIP(s): Agreement(s) in Principle.

BC: British Columbia.

COPE: Committee for Original Peoples' Entitlement.

CYI: Council for Yukon Indians.

DIAND: Department of Indian Affairs and Northern Development.

DM: Deputy Minister.

ECO: YTG Executive Council Office.

FMC(s): First Minister's Conference(s).

INAC: Indian and Northern Affairs Canada.

ITC: Inuit Tapirisat of Canada.

LCS: YTG Land Claims Secretariat.

MLA: Member of the Legislative Assembly.

MOU: Memorandum of Understanding.

MP: Member of Parliament.

NDP: New Democratic Party.

NWT: Northwest Territories.

SCC: Supreme Court of Canada.

TTC: The Teslin Tlingit Council.

UFA: CYI Umbrella Final Agreement.

YANSI: Yukon Association of Non-Status Indians.

YFN(s): Yukon First Nation(s).

YILCPC: Yukon Indian Land Claim Planning Council.

YLA: Yukon Legislative Assembly.

YNB: Yukon Native Brotherhood.

YTG: Yukon Territorial Government.

Chapter One

Introduction

The fundamental idea behind this thesis is that political action is predicated on ideas. These ideas reflect the values that people hold and the fundamental assumptions they make about how scarce resources ought to be distributed and how individuals and collectivities ought to relate to one another.

While the debate about aboriginal claims in Canada often revolves around pragmatic concerns - the amount of land to be held by aboriginal peoples, the political rights they will exercise, and the cost of settlement - underlying it all is a debate about the collective identities of aboriginal peoples and the nature of the relationship between aboriginal people - individually and collectively - and non-aboriginal people. Over the years this debate has been increasingly framed by the discourse of rights and particularly the idea of aboriginal rights as inherent rights.

There are numerous ways of conceiving of rights in the western philosophical tradition. There are legal rights and moral rights; individual rights and collective rights; conventional rights; human rights; and natural rights. The language of inherent rights, however, is unique to aboriginal rights discourse.

The concept of inherent aboriginal rights has been an important element of aboriginal claims in Canada since the 1970s. The concept has received a considerable workout from scholars and political leaders. However different meanings have been ascribed to it. As a concept, therefore, it remains somewhat elusive.

Philosophically there is much about inherent aboriginal rights that remains to be explained. In some ways it appears to be a unique approach to rights. However it also bears resemblance to certain western rights concepts. Politically it has gained increasing currency over the years. However questions also surround the political meaning of the term, particularly the implications that recognizing rights in this way hold for the Canadian state and aboriginal, non-aboriginal relations.

The settling of aboriginal claims is not strictly a legal or philosophical issue. It is a political issue. This means that, despite the large and growing number of court decisions regarding aboriginal claims, those claims can only be resolved by a negotiated settlement. And despite whatever conceptual confusion may surround the idea of inherent aboriginal rights it continues to inform aboriginal claims at the local, as well as constitutional, level.

But the fact that the meaning and implications of inherent rights are not well understood could make it a barrier to concluding agreements. In August 1995 the federal government issued a policy paper declaring that it "recognizes the inherent right of self-government as an existing right within section 35 of the Constitution Act, 1982."[1] But, as we shall see, this policy paper raises more questions about the federal government's position on the issue and does not really answer many.

In this context provincial governments may be wary of concluding agreements when the federal position on this concept remains ambiguous. At the same time aboriginal people may be reticent about ratifying agreements which will alter a concept which supports rights they have enjoyed "since time immemorial." Furthermore third parties and the general public may resist such agreements because of questions they have about how their rights and interests will be affected.

But are such concerns warranted ? To date no attempt has been made to link this approach to aboriginal rights with the outcome of a claims negotiation. As such, it remains an open question as to how the employment of inherent rights arguments affects negotiated agreements. The effect that inherent rights arguments have on third party rights and interests therefore is not known.

Understanding inherent aboriginal rights, then, is of both philosophical and practical value. If we hope to understand the aboriginal viewpoints on rights, and the relationship between aboriginal nations and the Canadian state, we must understand what it means to refer to aboriginal rights as inherent rights.

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[1] Canada, Government of. *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.* Minister of Public Works and Government Services Canada. Ottawa. 1995. p. 1.

One problem in looking at the inherent rights literature is that although the term is now commonly used politically it has not always been used by those writing from a more philosophical perspective.

If we look at the rights which aboriginal persons may claim it is clear that there are several types available. Some of these rights, such as those derived from statute law and the Constitution, may be claimed by any Canadian citizen. However there are also several categories of rights which may be claimed only by aboriginal persons based on their aboriginal status. These include treaty rights; aboriginal rights as defined (to the extent that they are) by the Constitution and interpreted by the courts; and usufructuary rights according to the common law. Finally, there are legal and moral rights claimed by aboriginal persons on the basis of their original occupation of North America.

My concern is with approaches to rights and the justification offered for different approaches. It is one thing to argue that an aboriginal person or collectivity has the right to hunt, fish, trap or exercise a degree of self-government because such a right is included in a treaty. It is a fundamentally different thing to argue that these rights exist because the individual or collectivity simply has, and has always had, the right to exercise them. In the latter case the existence of an agreement or the recognition of the right by another party is immaterial, the right is claimed as fundamental and is not the product of negotiation between parties or legislation passed by another party. It is these approaches to aboriginal rights that I will concentrate on in this thesis.

It should also be noted that the focus of this thesis is on the philosophical approaches that underlie aboriginal claims, the negotiating positions that emanate from those philosophical approaches, and the results of negotiations. I will not be discussing the extent to which rights are realized by the implementation of negotiated agreements. The latter issue is an extremely important one. However this subject would involve a thesis unto itself. It is also somewhat early in the implementation process to ascertain the degree to which the rights contained in the Council for Yukon Indians (CYI) Umbrella Final Agreement (UFA) are being realized.

It should also be noted that while I will be analyzing the concept of inherent aboriginal rights I will not be debating the validity of the concept. Certain authors have contested aboriginal rights, inherent or otherwise, either in terms of their very foundation or the way in which they have been applied in Canada.[2] This is an issue worth debating but it will not be the subject of debate here.

While some of the arguments presented may cite the law, it should be remembered that the law is used by advocates of inherent rights as an indicator of the recognition of rights, not the source of those rights. At the root of every inherent rights approach is a normative argument based on first principles.

The Question and its Significance.

The question this thesis seeks to answer is, what effect does the position that aboriginal rights are inherent rights have on the settlement of aboriginal claims ? I will attempt to answer this question by using the CYI UFA as a case study. The approach will be: first, to articulate the concept of inherent aboriginal rights; and second, to analyze the UFA and determine the degree to which it fulfils the logical requirements of inherent rights.

The CYI claim is a comprehensive land claim. As a result the settlement of that claim constitutes a modern treaty. There are large areas of Canada where comprehensive claims remain to be negotiated. As mentioned the concept of inherent rights underlies the approaches taken by many, if not all, aboriginal peoples, not just those in the Yukon. Therefore we can expect inherent rights discourse to figure prominently in current and future claims negotiations, as in British Columbia (BC).

Therefore a general method of gauging the effect of inherent rights arguments will have to be constructed. In this regard the focus will be not only on the outcome of negotiations but also on the process: what issues were raised by inherent aboriginal rights discourse ? How are these issues addressed, or not addressed, in the UFA ? And, does the outcome reflect an inherent rights perspective on those issues ?

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[2] See, for example, Richard Mulgan, "Should Indigenous Peoples Have Special Rights ?", *Orbis*, Summer 1989, pp. 375-388; and Melvin H. Smith, QC, *Our Home Or Native Land ?* Crown Western. Victoria. 1995.

Answering the questions posed in this thesis should give a clearer understanding of the probable state of aboriginal, non-aboriginal relations in the wake of an agreement where inherent rights claims come into play. Some people may be reassured by this, others may have their worst fears confirmed. In any event the issue should become clearer. That being said, it should not be assumed that the conclusions drawn will be cut and dried. It may be that inherent rights cannot be strictly defined, that what we will be left with is a series of characteristics which identify a position as being more, or less, an inherent rights position. This would leave us with a range of possible effects which would be dictated by all the factors involved in a given claim.

Research Design and Data.

Much has been written about aboriginal rights, including inherent aboriginal rights, and Chapter Two will review the existing literature. One aspect of this discussion will be to critique the inherent rights approach from a philosophical perspective. The point will be to identify various strains of the inherent rights argument, to summarize the concepts covered by these arguments and, perhaps most importantly, identify what is not be covered by these arguments as a rights argument. I will also identify the issues raised by inherent rights approaches and how these issues might be addressed in practice.

I will begin Chapter Three by detailing the UFA. I will then examine the question of whether, and to what extent, the UFA fulfils the logical requirements of inherent rights, as identified in Chapter Two. The case study will not attempt to provide the full historical context of negotiations in the Yukon. The focus will be on the period from 1985 to 1993. It is the negotiations in this period which culminated in the UFA.

Most importantly, from the point of view of analysis, I will attempt to draw my conclusions about the connection between discourse and outcome from the agreements themselves, rather than by trying to interpret the intentions of the parties involved. My interviews with those involved in the negotiations indicated that they did not concern themselves with philosophical concepts when they were negotiating. However even though the negotiators may not have had any intentions with regard to inherent rights discourse, the effects of that discourse on the negotiations process and the outcome can still be discerned.

The case study will lead to an analysis of the reasons why the UFA reflects the concept of inherent rights in the way, and to the extent, that it does. Chapter Four will concentrate on the role that rights arguments played in the outcome of the UFA negotiations. However, rights arguments - inherent, legal, or moral - are by no means the only factors which affected the outcome of negotiations. As such Chapter Five will deal with other factors which, at the territorial and national level, affected the development of inherent rights discourse and negotiations in the Yukon.

Chapters Two, Three and Five will rely on published works as sources. Chapters Three and Four will make use of primary materials collected in the Yukon, such as interviews conducted with those involved in negotiating the UFA, and the Yukon Government's Land Claims Secretariat files.

In all 21 interviews were conducted with 16 different individuals. Eighteen of the interviews were conducted in July and August 1993, in the wake of the signing of the UFA and the first four final, and self-government agreements. Three subsequent interviews were conducted in April 1994. The interview subjects occupied a wide range of offices including current and former chief negotiators for all three parties, two Yukon First Nation (YFN) chiefs, a former Yukon government leader, former Yukon Commissioners, the current and former Member of Parliament, a former Yukon cabinet minister, and the principal secretary to the current government leader.

It is worth noting that while these were the offices occupied by these individuals at the date of the interviews many of them individuals have been involved with the negotiations in different capacities over the more than 20 years since negotiations began.[3]

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[3] There was also a small number of individuals who declined to be interviewed. Most of them believed that they were not in a position to help me and referred me to someone who they thought would be helpful. In most cases they referred to either of two persons, one of whom was interviewed. One person simply did not want to discuss his involvement

Many of these individuals are still involved with the negotiation and implementation of individual YFN final and self-government agreements. Some of them are now in different positions than they occupied on the date of their interview.

My primary concern was to interview those who had been involved with the formulation and implementation of the negotiating position of each party from 1985 to 1993. It is these individuals who are quoted most often in this thesis. Other interview subjects are quoted less often, some not at all. However their contributions were important in developing my understanding of the broader historical, political, and social context in which negotiations took place. Without understanding this context one can not properly interpret the documents which were ultimately signed in 1993.

Many of the interview questions were directed toward the perceptions of rights that the different sides held. Other questions focused on the internal organization of the parties and how they formulated their negotiating positions. Questions also touched on the negotiations process and the conduct of those negotiations. This will, I think, prove particularly valuable since all the negotiators I talked to agreed that the process adopted after 1985 was an improvement over that which led to the 1984 Agreement-In-Principle (AIP), which was rejected by Yukon Indians. In fact the principled negotiations process itself is credited, to varying degrees, with facilitating the reaching of agreements.

In the conclusion I will summarize the arguments made in the thesis, and attempt to generalize my findings as to what issues are raised by inherent rights arguments and why the characteristics of this argument may or may not be reflected in agreements. It is not certain to what degree the lessons learned in the Yukon could be transferred to the rest of the country. One must consider the different economic, social, and political situations in the Yukon and elsewhere. Certain conditions, such as the constitutional status of the territorial government, make the Yukon situation unique. However other aspects of the CYI claim, such as the assertion of aboriginal rights as inherent rights, are similar to claims made elsewhere. Questions arise then as to how much knowledge is

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in the negotiations.

transferable, how important is that which is transferable, and whether there are basic patterns in negotiations which, despite differences, are still transferable.

The answers to these, and all other questions raised by this thesis must be taken as preliminary. For while much has been written about aboriginal rights, including inherent rights, the literature on the negotiation of aboriginal claims is sparse. Furthermore this is the first work which attempts to establish a connection between the two.

A Note on Terms.

Anyone who writes about land claims and self-government has to confront the issue of how to refer to the individuals and collectivities involved. My approach will be to employ the terms used in the Yukon during the period of negotiations.

The term *aboriginal* includes Indians (both status and non-status), Inuit, and Métis. This is the same manner in which it is employed in section 35(2) of the *Constitution Act, 1982*. When a particular group is referred to the specific term - Indian, Inuit, or Métis - is used. As for the Yukon the names of individual First Nations will be used where that is appropriate. The terms *Native* and *indigenous* are not used.

Indian collectives are referred to as *First Nations*, not *bands*. Similarly the governing structures of First Nations are referred to as *First Nations governments*, not *band councils*, unless the reference is to a specific institution established as a band council pursuant to the *Indian Act*. The organization which represented YFNs during the negotiation of the UFA is referred to as the *Council for Yukon Indians* even though this organization has since changed its name to the Council of Yukon First Nations.

Note that such terms as Native, indigenous, and band, will be used if such a reference is included in a direct quote. I realize that other terms could be used, or that different uses could be made of the terms used herein. In my view consistency and clarity are of the utmost importance.

Chapter Two

Inherent Aboriginal Rights

The purpose of this chapter is to analyze inherent aboriginal rights approaches from a philosophical perspective. I will begin by reviewing the literature on aboriginal rights. Then I will illustrate some of the common threads of those rights approaches which can be characterized as inherent rights approaches and compare them to western approaches to rights. I will also draw conclusions regarding the characteristics of an inherent rights approach and what practical issues are raised by it. I will conclude the chapter by offering a philosophical critique of the inherent rights approach.

Review of the Literature.

The literature on aboriginal political issues is large and growing. Keeping track of this growth is a difficult task. The difficulty of this task only accentuates the utility of a field study by Frank Cassidy.[4] Cassidy's focus was aboriginal self-government and his concern that "research about aboriginal governments has yet to emerge in a defined, bounded and self-generating manner." This was not, in his view, entirely a bad thing since it allowed researchers a certain flexibility in their work. However he also felt that identifying certain issues relating to aboriginal self-government could lead to a more "co-ordinated and interrelated" research agenda.[5]

Cassidy's study is becoming somewhat dated, if only because of the volume of material which has been published since his article. However his categorization of the field to that point, which he arranged as 14 areas of study, remains an important framework for researching issues related to aboriginal self-government.

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[4] Frank Cassidy, "Aboriginal Governments in Canada: An Emerging Field of Study", *Canadian Journal of Political Science*, XXIII:1, March 1990, pp. 73-99.

[5] Cassidy, "Aboriginal Governments in Canada", p. 73.

One of the areas he identified was that of aboriginal rights and title.[6] I do not intend to repeat the references which Cassidy provides. However some comments about his selections are warranted.

There is a large body of work that seeks to identify aboriginal rights as they exist, or could be argued to exist, in Canadian law. Cassidy mentions Kenneth Lysyk, Douglas Sanders, Thomas Berger, Brian Slattery, Kent McNeil, and Bradford Morse as authors who have produced important work in this field.

Legal realities also influence the work of others, such as Michael Asch, Norman Zlotkin, Brian Schwartz, and R.L. Barsh and J.W. Henderson. Their primary focus is aboriginal rights in the Canadian constitutional processes: how those rights are recognized in the constitution, what demands are made for greater recognition, and why that recognition has not been forthcoming.

Another area of some research involves the possibilities for aboriginal governments in the northern territories. Most of this literature - Cassidy mentions Gurston Dacks, Gordon Robertson, R.F. Keith and J.B. Wright, and C.M. Drury - deals with the Northwest Territories, not the Yukon.

Finally, Cassidy identified only two works - one by himself, the other by Delia Opekokew - which tried to "understand the meaning of aboriginal government in terms of the basic concepts of political theory."[7]

Since the publication of Cassidy's field study several other important works about aboriginal rights have been issued. There are two constants in the works published before and after Cassidy's initial field study. First, legal arguments and legal processes remain at the forefront of the debate regarding aboriginal rights. Second, the primary issue continues to be self-government, either by itself or in terms of its recognition in the constitution.

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[6] Cassidy, "Aboriginal Governments in Canada", pp. 76-78.

[7] Cassidy, "Aboriginal Governments in Canada", pp. 77-78.

Since 1990 Cassidy has edited three volumes of conference proceedings which have dealt with land claims in BC,[8] self-government,[9] and the outcome of the Gitksan-Wet'suwet'en case in BC.[10] The latter work is not the only recent one that tries to make sense of a judicial decision. Michael Asch (who contributed to *Aboriginal Title in British Columbia*) and Patrick Macklem have done the same, on a more limited scale, with regard to *R. v. Sparrow*.[11]

Other authors have tried to address aboriginal rights in a broader legal context. Peter Kulchyski has provided a valuable volume on Canadian legal history.[12] After a discussion of the problems of interpreting aboriginal rights within Canadian legal paradigms Kulchyski provides substantial excerpts from the decisions in eight landmark cases, from *St. Catherine's Milling* to *Sparrow*. Each case is preceded by a brief summary and interpretation of the decision.

The recognition of aboriginal rights in the constitution remains a live issue for Asch[13] and Slattery.[14] Elsewhere Macklem tries to expand the Canadian legal imagination as a means of accommodating self-government aspirations,[15] while Bruce Clark argues that the aboriginal right of self-government already exists in Canadian law.[16] On a similar theme Peter Hogg and Mary Ellen Turpel have discussed "how Aboriginal self-government could be implemented without any amendment of the Constitution of Canada."[17]

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[8] Frank Cassidy (ed.), *Reaching Just Settlements: Land Claims in British Columbia*. Oolichan Books and the Institute for Research on Public Policy. Lantzville, BC and Halifax. 1991.

[9] Frank Cassidy (ed.), *Aboriginal Self-Determination*. Oolichan Books and the Institute for Research on Public Policy. Lantzville, BC and Halifax. 1991.

[10] Frank Cassidy (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. Oolichan Books and the Institute for Research on Public Policy. Lantzville, BC and Montreal. 1992.

[11] Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*", *Alberta Law Review*, Vol. XXIX, No. 2, 1991, pp. 498-517.

[12] Peter Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts*. Oxford University Press. Toronto. 1994.

[13] Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity", *Alberta Law Review*, Vol.XXX, No. 2, 1992, pp. 465-491.

Using a less legalistic approach Turpel and Assembly of First Nations National Chief Ovide Mercredi have attempted to illustrate the importance of self-government to the future of First Nations.[18] Menno Boldt has addressed the issue of self-government in terms of the challenge it holds for aboriginal peoples and the possible consequences of the exercise of self-government powers.[19] One of these challenges is the desire of aboriginal peoples to revitalize traditional governing practices in their communities. J. Anthony Long deals with this issue in his study of the Blood and Peigan Nations.[20]

Once again articles which deal with aboriginal rights in terms of the basic concepts of political theory are few and far between. Dimitrios Karmis has attempted to

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[14] Brian Slattery, "First Nations and the Constitution: A Question of Trust", *The Canadian Bar Review*, Vol. 71, 1992, pp. 261-293.

[15] Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination", *McGill Law Review*, Vol. 36, No. 2, April 1991, pp. 382-456.

[16] Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada*. McGill-Queen's University Press. Montreal and Kingston. 1990.

[17] Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues", *The Canadian Bar Review*, Vol. 74, No. 2, June 1995, pp. 187-222.

[18] Ovide Mercredi and Mary Ellen Turpel, *In The Rapids: Navigating the Future of First Nations*. Viking. Toronto. 1993.

[19] Menno Boldt, *Surviving as Indians: The Challenge of Self-Government*. University of Toronto Press. Toronto. 1993.

[20] J. Anthony Long, "Political Revitalization in Canadian Native Indians Societies", *Canadian Journal of Political Science*, XXIII:4, December 1990, pp. 751-773.

reconcile aboriginal and non-aboriginal philosophical traditions by suggesting a compatibility between the emphasis on collective rights contained in aboriginal rights claims and the communitarian liberalism of Charles Taylor.[21]

Constructing a Theory of Inherent Aboriginal Rights.

One problem in using the above literature to construct a theory of inherent aboriginal rights is the legalistic slant of most of it. As mentioned in the introduction this thesis is more concerned with rights claims based on the integrity of aboriginal societies rather than those founded in interpretations of Canadian law.

This leads to the primary assumption of this thesis: that whatever inherent rights are they are not rights founded in Canadian law. It may be argued that it is premature to make such an assumption. In fact it may be argued that I am assuming one of the things I am supposed to be proving.

I offer two defences for making this assumption: the first intuitive, the second logical. First, in reading the works of those who argue for aboriginal rights one can identify a particular kind of argument that avoids using Canadian law as a justification of rights. As mentioned above one of the problems in investigating this line of thought is that some authors use the term inherent aboriginal rights, others do not. Second, we have already categorized the argument offered by those use the law as a justification of aboriginal rights: these are legal rights arguments. Investigating non-legal arguments gives us an opportunity to see if there is anything different and valuable in them. If there is we have another line of argument. If there is not we can always go back to our established line of thought: legal rights.

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[21] Dimitrios Karmis, "Cultures autochtones et libéralisme au Canada: les vertus médiatrices du communautarisme libéral de Charles Taylor", *Canadian Journal of Political Science*, XXVI:1, March 1993, pp. 69-96.

For the purpose of this thesis *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*[22] remains the most comprehensive attempt at dealing with the question of aboriginal rights. The book is divided into five sections which address both the theoretical and practical aspects of the aboriginal rights debate. These include: Political and Philosophical Perspectives on Aboriginal Rights by Indian, Inuit and Métis Leaders; Aboriginal Rights in the Constitutional and Policy-Making Processes; Historical and Contemporary Legal and Judicial Philosophies on Aboriginal Rights; Negotiated and Supranational Approaches to Securing Aboriginal Rights; and Aboriginal Rights and Aboriginal Government. The different chapters are contributed by aboriginal leaders, politicians, lawyers, and academics; and provide as broad a collection of views on the above issues as will be found anywhere.

For this chapter the most relevant section is the first: Political and Philosophical Perspectives on Aboriginal Rights by Indian, Inuit and Métis Leaders. I will draw on the works of Oren Lyons, David Ahenakew, Fred Plain, Chief John Snow, Peter Ittinuar, Clem Chartier and Bill Wilson as they address the issues of the source, and the nature, of aboriginal rights.

These issues are also addressed by authors who take a more, but not entirely, legalistic approach. The works of Asch and Macklem, James Youngblood Henderson, Slattery, and Opekokew will be considered in this light. What differentiates these works from others which use Canadian law is that the above authors point to certain documents and practices in Canadian law as indicators of the recognition of aboriginal rights, not as the source of those rights.

According to Lyons aboriginal rights "were given to [aboriginals] by the Creator" when they were put on earth.[23] This is a widely held perspective expressed by representatives of many aboriginal peoples.[24] Because of their divine origin aboriginal rights are seen as the product of "the natural law" and are themselves "the law of the Creator."[25] As such neither aboriginal peoples, the Canadian government, nor any other entity can change this law or the attendant rights because "[t]he matter of aboriginal rights is outside our jurisdiction."[26] Human beings therefore must recognize the existence of these rights and live by the law that created them.

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[22] Menno Boldt and J. Anthony Long in association with Leroy Little Bear, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*. University of Toronto Press. Toronto. 1985.

[23] Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights", in Boldt, Long and Little Bear, p. 19.

As for the nature of aboriginal rights Lyons, again not atypically[27], focuses on the responsibilities one assumes as a holder of rights.[28] The primary responsibility is to "look after all life on this earth"[29] and to preserve the land for future generations.[30] This, he argues, is not simply a matter of right or responsibility but of survival: "[W]e must adhere to [the natural law] or else we are all going to disappear."[31]

David Ahenakew's primary concerns are with the federal government's insistence on identifying and defining aboriginal rights, and on separating the concepts of aboriginal rights and aboriginal title. He argues that this approach is impossible and unnecessary, and is ultimately a device to reduce aboriginal rights. Ahenakew distinguishes between aboriginal rights and aboriginal title but sees them as intimately connected and inextricably linked in that the right of self-government and aboriginal sovereignty are derived from having title to the land.

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[24] see, for example, David Ahenakew, "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition", in Boldt, Long and Little Bear. p. 24; Miluulak (Alice Jeffrey) "Remove Not the Landmark" in Cassidy (ed.) *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. p. 58; and Wigetimstochol
(Dan Mitchell) "Deep Within Our Spirit" in Cassidy (ed.) *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*. p. 62.

[25] Lyons p. 19.

[26] Lyons p. 19.

[27] See also Ahenakew p. 24, and Sharon McIvor in Cassidy (ed.), *Aboriginal Self-Determination*. pp. 82-84.

[28] Lyons p. 20.

[29] Lyons p. 19.

[30] Lyons p. 22.

[31] Lyons p. 23.

Ahenakew asserts that the most important aboriginal right is that of self-government, since it is this right which carries the collective authority to fulfil one's responsibilities.[32] This right inheres in the collective itself, and not in the aggregate individual rights of its members.[33] It is not necessarily the case that members of an aboriginal nation do not hold individual rights. Their individual rights, however, are held "by virtue of membership in a First Nation."[34] Furthermore Ahenakew argues that the right of self-government is "a collective human right" that may be claimed by aboriginal peoples "no matter where they might live."[35]

However if this right is a ***human*** right it is not unique to aboriginal peoples. In claiming a right to self-government aboriginal peoples are merely laying claim to a right available to all peoples.

Fred Plain finds the source of aboriginal rights in the fact that aboriginal peoples were the first to inhabit North America.[36] Once again original occupation is said to confer title which serves as the basis of a rights claim. The historical fact of original occupation is also seen as the basis for the legal necessity of concluding treaties between the Crown and aboriginal nations.[37] However these treaties, and other documents such as the *Royal Proclamation of 1763*, merely recognized, and did not create, the rights claimed.[38]

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[32] Ahenakew p. 24.

[33] Ahenakew p. 25.

[34] Ahenakew p. 26.

[35] Ahenakew p. 25. This does not mean that aboriginal peoples can claim any land in North America. They are only entitled to claim land which they occupied at the time of contact with Europeans.

[36] Fred Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America", in Boldt, Long and Little Bear, p. 33.

The position that aboriginal title was recognized, and not created, by the *Royal Proclamation of 1763* is supported by the Supreme Court of Canada which, in *Calder*, "recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands."[39]

Plain defines aboriginal rights as "the right of independence through self-government."[40] This includes the right of aboriginal peoples "to develop [their] own life-style and [their] own economy, and to protect and encourage the practice of [their] sacred traditions as [they] know them."[41] Though this idea is problematic to Canadian governments Plain considers it "basic, simple and unambiguous."[42] "Aboriginal rights", he says, "are a riddle only to those who do not want to hear or face the truth, who do not want their taking of the land interfered with by the aboriginal owners of this continent."[43]

Unlike Lyons and Ahenakew, Plain uses the term inherent when referring to aboriginal rights. He does not explain what he means by using this adjective. However it is clear from his chapter that these rights do not originate from a grant by the Canadian government. Furthermore these are rights which are to be exercised by aboriginal peoples without interference from the Canadian government.[44] His explanation is also historical in that he asserts that "these rights flow from our long-standing civilization" and "historical sovereignty over the land."[45]

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[37] Plain p. 35.

[38] Plain pp. 34-35.

[39] *Guerin v. The Queen*. Canada, Supreme Court Reports (1984), Volume 2, p. 376.

[40] Plain p. 32.

[41] Plain p. 32.

[42] Plain p. 32.

[43] Plain p. 39.

[44] Plain pp. 32-33.

Chief John Snow recognizes the political nature of rights claims, stating that "the process of definition will take years of bilateral discussions and negotiations between the Indian people and the government of Canada."[46] Note that Snow acknowledges that, in the current context, aboriginal rights need to be defined. But defining rights and creating rights are not the same thing. Snow emphasizes the importance of the treaties between First Nations and the Crown as an indicator of aboriginal rights:

> It is because of the treaties that our forefathers signed that we still retain our aboriginal Indian rights.[47]

For this reason he declares the treaties to be "sacred covenants... binding documents...[which] must not be altered unilaterally by the government of Canada."[48]

However he does not see the treaties as the source of aboriginal rights. Like Plain he emphasizes that

> When the Europeans first came over they knew that we were the owners of this land. That is why they made treaties with us.[49]

He also distinguishes between "aboriginal and treaty rights", suggesting that aboriginal peoples have rights beyond those contained in the treaties.[50]

As for the nature of aboriginal rights Snow asserts that the treaties confirm that aboriginal peoples "are not just a minority group in Canada...[they] are the original peoples with special rights and special status."[51] These special rights include "rights to education, medical services, and economic development; and to our rights to hunt, fish and trap."[52]

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[45] Plain p. 33 and p. 35.

[46] Chief John Snow, "Identification and Definition of Our Treaty and Aboriginal Rights", in Boldt, Long and Little Bear, p. 41.

[47] Snow p. 41.

[48] Snow p. 42.

[49] Snow p. 45.

[50] Snow p. 45.

Peter Ittinuar does not use the word inherent to describe aboriginal rights. Once again, however, the historical dimension is front and centre as Ittinuar draws attention to the Inuit as a "distinct people" who "have exercised [their] aboriginal rights freely for countless generations" and have "never ceased to enjoy [them]."[53] In this sense the Inuit's "chief task in the aboriginal rights debate [is] securing a guarantee from the federal government for the continuation of [their] historical rights."[54]

Ittinuar recognizes that aboriginal rights come in different forms, including treaty rights, constitutional guarantees, and aboriginal title.[55] He, like Ahenakew, distinguishes between aboriginal title and aboriginal rights.[56] Often aboriginal title is posited as the basis of aboriginal rights.[57] Further it is the basis for aboriginal claims to land which are uniformly important in discussions of aboriginal rights and, according to Ittinuar, are the "key issue that has to be resolved."[58] As Ittinuar states, "[o]ur collective identity as indigenous peoples has been and will continue to be dependent on our relationship to the land and all that it provides."[59]

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[51] Snow p. 42.

[52] Snow p. 44.

[53] Peter Ittinuar, "The Inuit Perspective on Aboriginal Rights", in Boldt, Long and Little Bear, p. 47 and p. 50.

[54] Ittinuar p. 48.

[55] Ittinuar p. 48.

[56] See Ahenakew, above.

[57] See Bill Wilson, "Aboriginal Rights: The Non-status Indian Perspective", in Boldt, Long, and Little Bear, pp. 62-68.

[58] Ittinuar p. 49.

Like Snow, Ittinuar recognizes that the process of "translating a claim based on an undefined title into concrete rights and obligations" will involve negotiations with Canadian governments.[60] However Ittinuar makes it clear that aboriginal title pre-dates contact with non-aboriginal peoples. Definition is necessary only as a means of allocating jurisdiction. As Ittinuar states, "[o]ur goal in the land claims process is to translate our undefined aboriginal rights into more precisely defined arrangements for sharing administrative control over the lands we live on."[61]

Clem Chartier notes that over the years the various claims of aboriginal peoples have been given different labels: aboriginal title, Indian title, native title, usufructuary rights, and aboriginal rights.[62] From the earliest times of contact some European writers and theologians recognized "that Indians, although heathens and non-Christians, nevertheless were capable of ownership of land and had sovereignty over their territories."[63] Though this view was not swallowed whole by the colonial powers those powers did, from time to time, find "it useful to recognize some of the rights possessed by the aboriginal inhabitants."[64] In general, however, legal and political concepts regarding aboriginal peoples were designed or interpreted to serve the legal and political ends of colonial powers.

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[59] Ittinuar pp. 48-49.

[60] Ittinuar p. 50.

[61] Ittinuar p. 51.

[62] Clem Chartier, "Aboriginal Rights and Land Issues: The Métis Perspective", in Bold, Long and Little Bear, p. 54. Later, at page 61, he states that "It must always be kept in mind that the [constitutional] conferences are for the purpose of identifying and defining all the rights of aboriginal peoples, not merely their aboriginal and treaty rights."

[63] Chartier p. 54.

[64] Chartier p. 54.

Over time the European nations developed a doctrine of discovery by which they laid claim to lands in North America. Even though these nations claimed to have discovered parts of North America "the aboriginal peoples had a right to continue using the land until they either gave up that right or were conquered."[65] Aboriginal title developed as a form of land tenure for the original occupants of North America under the umbrella of the sovereignty of European nations. However though the concept evolved it was never explicitly defined or rigorously enforced. Hence "[t]here is still no clear, definitive statement to be made about what exactly is covered by the term 'aboriginal title'" despite the fact that numerous court cases have been contested where aboriginal rights and title were important considerations.[66] So far the courts have only been able to identify aboriginal title as a "possessory right" which includes the right to hunt, trap and fish. This right "can only be surrendered to the crown, and once it has been surrendered the crown title becomes absolute."[67]

One should keep in mind that Chartier is here describing aboriginal rights as they were, in his view, recognized in Canadian law in the mid-1980s. He is not making a normative statement. He views the origins of aboriginal rights as being elsewhere. This is evident by his statement that the *Royal Proclamation of 1763* was "[t]he first major instrument to recognize [not create] the rights of aboriginal people."[68] Furthermore he asserts that aboriginal title, to the extent that it has been defined by Canadian courts, is a "legal fiction" which is subordinate to the Métis' right to self-determination. The Métis Nation, says Chartier, has "a right to a homeland and self-government no less than the Palestinians or the blacks of South Africa."[69]

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[65] Chartier p. 54.

[66] Chartier p. 54-55.

[67] Chartier p. 55.

[68] Chartier p. 56.

[69] Chartier p. 60-61.

Bill Wilson's thesis is that "the question of aboriginal title and the rights that flow from that title, as well as the exercise of those rights, is the same for non-status Indians as it is for status Indians."[70] This is because the status, non-status distinction is simply a federal government construct designed to reduce its obligations to aboriginal peoples.

Wilson states that the "[a]boriginal rights [that] flow from aboriginal title" are inalienable because "no generation or special group has the right to sign away the rights of any future generation."[71] This does not mean that the current generation cannot negotiate agreements. In fact he acknowledges that "[t]he aboriginal rights of all the original inhabitants of the land will be negotiated on the basis of the existence of aboriginal title to that land."[72] However "[e]ven if land claims are resolved today, the future descendants of the original occupiers of the land will be entitled to negotiate their own bargain in regard to aboriginal title and rights."[73] According to Wilson, it seems, the certainty that Canadian governments seek through land claims and self-government agreements is an impossibility.

The perpetual nature of aboriginal rights, even in the face of treaties or legislation, is particularly important to non-status Indians since they have been deprived of rights and benefits accorded to status Indians under Canadian law. Wilson's position is that "non-status Indians claims to aboriginal title represent an aboriginal right" which remains unextinguished and inextinguishable.[74] Recognition of this right, he feels, will ultimately purge the term *non-status Indian* from our vocabulary, and non-status Indians will ultimately refer to themselves by their "traditional band or tribal names."[75]

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[70] Wilson, p. 67.

[71] Wilson p. 62.

[72] Wilson p. 67.

[73] Wilson p. 62.

[74] Wilson p. 65.

[75] Wilson p. 67.

Like many other aboriginal writers Wilson refers to aboriginal rights as "historical rights that flow from aboriginal title [and] cannot be defined or restricted by the Indian Act or any other legislation passed by federal or provincial governments."[76] Wilson can not view aboriginal rights as something created by Canadian governments if those governments are powerless to define or restrict them.

Those who assert inherent aboriginal rights deny that these rights were created by Anglo-Canadian law. Some writers, however, use legal arguments to assert the inherent nature of aboriginal rights. In some cases this is meant to indicate that Anglo-Canadian legal concepts embrace aboriginal rights which are inherent in origin. In others international law is cited to illustrate that the community of nations has recognized the existence of aboriginal rights from the time of first contact. In this sense aboriginal rights are inherent rights in that they are seen to exist before, and even despite, the exercise of sovereignty by European nations over North America.

Michael Asch and Patrick Macklem deal with the concept of inherent rights by contrasting it with the concept of contingent rights and then elucidating these two concepts as competing theories of aboriginal rights. In both theories two points are of primary importance. The first is the source of aboriginal rights. The second is the effect each of these theories has on perceptions of aboriginal sovereignty and the exercise of aboriginal self-determination.

A contingent rights approach "assumes the legitimacy of executive and legislative authority over First Nations."[77] Here it is the state's "*recognition* of a valid aboriginal claim to freedom from state interference" that serves as the source of the right.[78] In this context aboriginal sovereignty, if it is recognized at all, does not exist until, and unless, the state recognizes it, perhaps by way of a constitutional amendment. As such the aboriginal right of self-government, for example, "exists only to the extent [that] it is given force by legislation or executive action."[79]

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[76] Wilson p. 66.

[77] Asch & Macklem p. 501.

[78] Asch & Macklem p. 501, emphasis added.

An inherent rights approach views these rights as emanating from "the very meaning of aboriginality."

> The production and reproduction of native forms of community require a system of rights and obligations that reflect and protect unique relations that native people have with nature, themselves and other communities.[80]

This system of rights and obligations can only exist where aboriginal polities function "independently of any [non-aboriginal] legislative or executive action."[81] The right of aboriginal peoples to function independently is legitimated not by the legislative and executive authority of non-aboriginal governments but by the fact that "First Nations sovereignty and aboriginal forms of government ...pre-existed the settlement of Canada and continue to exist notwithstanding the interposition of the Canadian state."[82] Executive, legislative or judicial action by the Canadian state affects the *recognition* of "First Nations sovereignty and native forms of self-government in Canadian law."[83] Such recognition, however, is immaterial to the *existence* of aboriginal rights.

To Asch and Macklem, therefore, aboriginal rights are a free-standing conception of rights that does not rely on Anglo-Canadian concepts, the Canadian state or its legal system, for its legitimacy.[84] It is the pre-existing, freestanding nature of these rights which make them inherent rights.

James Youngblood Henderson has constructed an approach which places aboriginal rights as a fundamental precept of both international law and the British common law.

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[79] Asch & Macklem p. 502.

[80] Asch & Macklem p. 502.

[81] Asch & Macklem p. 502.

[82] Asch & Macklem p. 503.

[83] Asch & Macklem p. 503, emphasis added.

[84] Asch & Macklem pp. 502-503.

According to Youngblood Henderson aboriginal rights are not a unique category of rights, available only to the aboriginal nations of the Americas, but flow from the rights of property and self-determination that all peoples enjoy.

Youngblood Henderson begins by asserting that in democratic states the role of law is to "guarantee the supreme goods of social life, order, and freedom to all people."[85] In order to do this

> [t]he legal system of the democratic state...created... four fundamental principles of law [tort, restitution, contract and property] which...define the universal structure of human relations, and they also provide a standard for evaluating the performance of any legal system in dealing with aboriginal rights in North America.[86]

This is because it is these principles which would give rise to legal rights in a democratic polity. Of course rights must also be enforced. According to Youngblood Henderson:

> The tort principle and the restitution principle committed public law to the maintenance of an individual's present system of rights and advantages by protecting him against involuntary losses...The contract and property principles permit persons to make use of protected rights and advantages by enforcing voluntary dispositions between and across public spheres...These four principles should have assured the integrity of tribal property from unconsented-to intrusions by Europeans in Canadian law.[87]

Youngblood Henderson asserts that shortly after aboriginal, non-aboriginal contact a concept of aboriginal rights began to develop which "recognized the national character of the Indian tribes, uniformly applied to those tribes the rights of the law of nations and asserted their right to ownership of the land under their laws and customs."[88]

This doctrine of aboriginal rights, which Youngblood Henderson says, "was based on a vision of universal rights and freedom in the world order" fully incorporated the principles of tort, restitution, contract and property.[89] Furthermore it "was accepted as legitimate in the law of nations."[90]

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[85] James Youngblood Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition", in Boldt, Long and Little Bear, p.185.

[86] Youngblood Henderson p. 186.

[87] Youngblood Henderson p. 186.

[88] Youngblood Henderson p. 188.

The situation is somewhat different when aboriginal rights come in contact with British common law. Youngblood Henderson portrays the common law as somewhat inward looking, in that

> [t]he common lawyers of England...had little interest in the law of nations and no theory or doctrines of law. Instead, they believed in the history and experience of the ancient procedures and formulas of the common law. The common lawyers believed all political questions could be solved by reducing them to legal questions and deciding them on the basis of precedent.[91]

This is not to say that aboriginal peoples had no rights under the common law. They did; and the "[t]hree principles [which] vested existing rights of native governments in the British law of nations [were]: the contractual principle of discovery, the proprietary principle of purchase of native lands, and the contractual principle of treaty commonwealth."[92]

The contractual principle of discovery did not allow the British Crown to extinguish aboriginal rights by virtue of a unilateral proclamation. The consent of aboriginal nations was required. This is because discovery

> asserted a relative jurisdictional right against other European princes as a contractual convention...[O]nly by a voluntary disposition from the American nations could one claim an estate or rights in the New World.[93]

The proprietary principle of purchase flowed from the contractual principle of discovery. Once a relative jurisdictional right was asserted against other European nations aboriginal territories had to be purchased before they could be colonized. "[C]onquest", says

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[89] Youngblood Henderson p. 188.

[90] Youngblood Henderson p. 189.

[91] Youngblood Henderson p. 191.

[92] Youngblood Henderson p. 191.

[93] Youngblood Henderson p. 193.

Youngblood Henderson, "was never asserted as a legal justification for acquiring tenure from the natives...[only] to acquire discovery entitlements from other European princes."[94]

The development of the contractual principle of treaty commonwealth was heavily influenced by John Locke. In the late 17th century Locke was appointed to a committee of trade which was a sub-committee of the Privy Council. The mandate of the committee was to reform the system of colonial administration. According to Youngblood Henderson

> Locke...brought with him his political philosophy of consensual government and free association. In this capacity Locke introduced the reforms which eventually became the cornerstone of British law and policy toward American nations.[95]

Locke asserted that in a state of nature, "[i]ndependent states were equal in the sense that no one state [has] dominion or jurisdiction over another."[96] As such treaties were "contractual alliance[s] in the law of nations and...not a comprehensive subordination of will."[97]

This distinction continued to exist even where the treaty was one of protection. Under British law protected nations retained their sovereignty, except as limited by the treaty.[98] In effect the British Crown was, by treaty, exercising "the delegated rights of the Sovereign" to the extent, and only to the extent, that the treaty allowed. This did not allow for the application of English law over that nation's citizens.[99]

According to Youngblood Henderson, then, aboriginal rights have long been a recognized, confirmed, and respected concept in both international law and the British common law. His approach is legalistic, however it also shows that in some ways the common law incorporated concepts which might be described as universal. As such the emphasis on the equality of states and the fact that alliances do not constitute "a comprehensive subordination of will", in my view anticipates a theory of aboriginal rights as inherent rights.

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[94] Youngblood Henderson p. 193.

[95] Youngblood Henderson p. 196.

[96] Youngblood Henderson p. 196.

[97] Youngblood Henderson p. 196.

[98] In other words "[a]ll those powers which are not surrendered [explicitly one assumes] are retained." This, notes Youngblood Henderson, is "the difference between annexation and protection" p. 202.

[99] Youngblood Henderson pp. 200-201.

One aspect which is common to all aboriginal rights approaches is that they seek to establish the nature of the relationship between aboriginal peoples and the Canadian state. However whereas Youngblood Henderson focuses on international law and the common law, Delia Opekokew focuses first on the treaties between aboriginal peoples and the Canadian state and then analyzes them in the context of international law.

Opekokew, like Youngblood Henderson, asserts that the relationship between First Nations and the Canadian state is an international one. The idea of a nation that is used is not a sociological one but a political one, as in the case of sovereign, independent states. As she explains

> A treaty is an agreement, league, or contract between two or more nations or sovereigns, formally signed by properly authorized commissioners, and solemnly ratified by the sovereigns or the supreme power of each state.[100]

In this way her argument is near the inherent rights end of the inherent rights-contingent rights continuum. This is because aboriginal rights are seen as pre-existing and remaining outside of the unilateral purview of the Canadian state.

The significance of this characterization is that it is the nature of the relationship between entities which prescribes the manner in which sovereign parties may treat one another and each other's citizens. An international relationship asserts that the parties must treat each other formally as equals, even if they are not equally powerful, and must not interfere in each other's internal affairs by, among other things, regulating the lives of each other's citizens. Under this understanding the Canadian government is guilty of violating the rights of aboriginal peoples, the treaties, and the international relationship by passing, and enforcing, such legislation as the *Indian Act*, and by obstructing aboriginal nations in governing themselves.

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[100] Delia Opekokew, *The First Nations: Indian Government and the Canadian Confederation*. Federation of Saskatchewan Indians. 1980. p. 9.

In order for this argument to hold Opekokew must show that the relationship between aboriginal nations and the Canadian state is an international one by virtue of the nature of the treaties signed, rather than by the more universal approach that Youngblood Henderson uses.

Using the treaty-making process in Saskatchewan as an example, she argues that the form the negotiations took, as well as the attendant "pomp and pageantry...followed the pattern of any meeting between two nations."[101] Both the British Crown and the Indian nations entered negotiations for particular reasons. The Crown sought to "extinguish Indian rights to the land" while the Indians sought to "establish peace between [themselves] and the whites, and to obtain guarantees in exchange for the surrender of certain lands."[102]

Once again the fact that negotiations of this type were seen as required by the British Crown is indicative of the existence of native sovereignty. The fact that only "some of their powers [were ceded] to the Crown in exchange for certain benefits" is taken to indicate that some measure of this sovereignty was meant to continue.[103]

A truly international relationship between the Indian nations and Canada would have allowed for the parallel and independent (or perhaps interdependent) development of these societies rather than the evolution of a situation where the citizens of one became the wards of the other. Rules regarding interaction would have been based on consent through negotiation rather than legislation meant to satisfy the interests of the stronger party. This, says Opekokew, is the type of relationship which should have developed since "[t]he treaties were signed so that Indian people could retain their inherent sovereignty and live as Indian people forever."[104] This relationship, she believes, can be restored by political and judicial will to understand and enforce not only the letter but also the spirit and intent of the treaties.

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[101] Opekokew p. 10.

[102] Opekokew p. 9.

[103] Opekokew p. 10.

In asserting an international relationship between the Indian nations and the Canadian state Opekokew borrows two important international law concepts. First, like Youngblood Henderson, she asserts that "association with another state does not necessarily result in surrender of sovereignty." Second, that "acts contrary to law cannot become a source of legal rights for the wrongdoer."[105]

But unlike Youngblood Henderson Opekokew rejects the bulk of international law, as it developed in the 18th and 19th centuries, because it was based entirely on European traditions regarding land ownership and use. She takes a different view of concepts such as the doctrine of discovery and aboriginal title saying that they were developed as means of usurping, not protecting, aboriginal rights.[106] To put it bluntly "Indian people cannot accept [and should not be forced to accept] theories that were developed from one side only."[107]

Brian Slattery, on the other hand, places aboriginal rights closer to the contingent rights end of the continuum. He accepts the idea that separate aboriginal nations exist in Canada. "[N]ative Canadians", he says, have a special status in the Canadian political system and "are not...one more ingredient in the cultural potpourri of modern Canada."[108] It is his position that "First Nations possess inherent and sovereign authority over their own affairs, which does not owe its existence to the *Indian Act* or other legislation."[109]

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[104] Opekokew p. 15.

[105] Opekokew p. 15 and p. 14.

[106] Opekokew pp. 13-14.

[107] Opekokew p. 15.

[108] Brian Slattery, "Understanding Aboriginal Rights", *The Canadian Bar Review*, Vol. 66, 1987, p. 783.

[109] Slattery, "First Nations And The Constitution: A Question Of Trust" p 262.

But his use of words like *nation* and *sovereignty* does not imply the existence of independent states. He believes that "the powers of aboriginal governments are limited in scope and can be exercised only within the context of the Canadian Confederation."[110]

The essential contention between Opekokew and Slattery rests on the nature of aboriginal sovereignty and independence. Opekokew's argument is that documents like the *Royal Proclamation of 1763* and the treaties recognized and affirmed the independent and sovereign nature of aboriginal nations.[111] Slattery's interpretation is different. According to him

> In pre-European times, the indigenous peoples of Canada were sovereign and independent nations controlling their own territories and ruling themselves under their own law. In various stages, these nations passed under the sovereignty of the Crown, and their members are now Canadian subjects.[112]

He states, for example, that in signing treaties "Indian groups...ostensibly [acknowledged] the Crown's sovereignty, receiving in turn assurances of protection."[113] He further states that the *Royal Proclamation of 1763* did not recognize the Indian nations as parallel states. Instead, by negotiating treaties in the wake of this proclamation, Indian nations accepted "the protection of the Crown as its subjects."[114]

The understanding, therefore, that Slattery gives to this recognition of Crown sovereignty is distinctly different than Opekokew's. In interpreting the meaning of the treaties she invoked the principle of international law "that association with another state does not necessarily result in surrender of sovereignty." Slattery asserts that in this case it did, at least to the extent that whatever aboriginal sovereignty was left was to be exercised under the umbrella of Crown sovereignty.

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[110] Slattery, "First Nations and the Constitution...", p. 262.

[111] Opekokew p. 9.

[112] Slattery, "First Nations and the Constitution...", p. 262.

[113] Slattery, "Understanding Aboriginal Rights", p. 734.

[114] Slattery, "Understanding Aboriginal Rights", p. 753.

Based on the above information one can sketch the following portrait of inherent aboriginal rights:

Inherent aboriginal rights are Creator-given rights. This divine origin leads to an historical connection: the Creator put aboriginal peoples in North America. This historical fact establishes a strong tie between aboriginal peoples and the land. Historical priority also gives aboriginal peoples title to the land. This title is the source of a right of self-determination which itself is the source of a comprehensive list of specific rights. These rights carry with them responsibilities, essentially to preserve the land for future generations.

Inherent aboriginal rights approaches come in two forms. One is similar to the western concept of a moral right in that it seeks to realize claims which are not currently recognized in Canadian law, without resorting to legal arguments (though perhaps serving as a basis for subsequent legal arguments). The second is premised on a reading of international law which asserts that the aboriginal nations of North America possessed rights which were recognized for years by European powers and which continue to serve as the basis of current claims. One difference between these two approaches is that in the latter aboriginal rights are not viewed as a distinct form of rights but rather are basic human rights as exercised by aboriginal nations.

This sketch may be accused of being soft in that it presents inherent aboriginal rights approaches as uniformly compatible. This is not necessarily the case. Furthermore moral and legal arguments are often mixed when an inherent aboriginal rights argument is made.

Inherent Aboriginal Rights as a Rights Argument.

Though there are many different types of rights all rights rely on either law or moral principles for their legitimacy and enforcement. Legal rights are founded on "appealing to and interpreting practices, documents and rules that can be argued to have legal standing."[115] Moral rights are those which are established "because individuals or communities are entitled to [them]" and failure to recognize them is seen as "a fundamental injustice."[116] Such rights exist whether they are recognized in law or not.

Inherent aboriginal rights are similar to moral rights in this way. They assert what the relationship between aboriginal peoples and the Canadian state ought to be regardless of what is written in law. Though legal arguments are sometimes used these are used to indicate a recognition of aboriginal rights not their creation.

Different authors have attempted to address the question, what is a right ?[117] No single answer has emerged as definitive. In my view it is easier to appreciate rights if we rephrase the question as, what does it mean to have a right ? This rephrasing is subtle but important. As will be explained further, rights usually operate in a context where there is a relationship between the rights holder and one or more obligants. Rephrasing the question does more to capture the dynamic nature of rights and what they do to the relationship between rights holder and obligant.

Yet regardless of how they are described, defined or characterized, or how the question is posed, having rights will in most cases confer an advantage on the rights holder. This is not always the case. It might be argued that there is no advantage in a right of succession if it leaves one heir to a debt-ridden estate. However this example simply reiterates the dynamism of rights relationships. Here one's right of succession brings one in contact with another's right, to be paid. In this case a right has given rise to an obligation.

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[115] Thomas C. Pocklington, *The Government and Politics of the Alberta Métis Settlements*. Canadian Plains Research Centre, University of Regina. Regina. 1991. p. 124.

[116] Don Carmichael, Tom Pocklington and Greg Pyrcz, *Democracy and Rights in Canada*. Harcourt, Brace, Jovanovich Canada. Toronto. 1991. pp. 202-203.

[117] See, for example, Carmichael, Pocklington and Pyrcz; Joel Feinberg, *Rights, Justice and the Bounds of Liberty*. Princeton University Press. Princeton. 1980; H.L.A. Hart, "Between Utility and Rights" in R.M. Stewart, *Readings in Social and Political Philosophy*. Oxford University Press. New York. 1986. Margaret Holmgren, "Raz on Rights". *Mind* XCIV: 376, pp. 591-595, 1985; Michael McDonald, "Questions About Collective Rights" in David Schneiderman (ed.), *Language and the State*. Les Editions Yvon Blais. Cowansville, Quebec. 1991.

In most cases having a right means being in a position to impose a duty on another person or persons. This duty could involve having to perform an action (paying money owed) or having to refrain from performing an action (not interfering with the speech or action of the rights holder).

Still there are a number of *caveats* that one should remember about rights in addition to the one above. First, while a right puts one in a particular position, one is not obligated to exercise one's rights. Indeed there may be times when it would be wrong to do so. The important point, however, is that the existence of a right means that the choice is often up to the rights holder. I say *often* because a second feature of rights is that none are absolute. Rights are defeasible: in certain circumstances they may be set aside by more important considerations. The rights continue to exist but they are not applied. Third, most legal rights are purely conventional and are not meant to protect moral rights claims.[118] Fourth, rights only oblige *certain* parties to perform the corresponding duty.[119] A debt, for example, can only be extracted from the person who owes the money. Fifth, rights can be seen as limiting in that only parties with a valid claim may take resources and then only what is their due. Sixth, rights can establish priorities as to who can claim what.[120] The establishment of priorities is important since rights often conflict with other rights. Seventh, rights are distributive. They seek to allocate, in a confrontational context, scarce resources.[121] The fact that there is not enough of given resources to go around requires that some people be given priority to them by the establishment of rights.[122]

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[118] Carmichael, Pocklington & Pyrcz pp. 8-10.

[119] Joseph Raz, "On the Nature of Rights", *Mind* XCIII: 370, p. 211.

[120] Hart p. 313.

[121] McDonald, "Questions About Collective Rights" pp. 9-10.

[122] David Lyons, "Human Rights and the General Welfare". *Philosophy and Public Affairs*, Volume VI, Number 2. 1977. p. 126.

Finally, the allocation of rights is a rule-governed activity. Within any society there are established procedures for determining who has legal and/or moral rights and who has a corresponding duty. Rights are not distributed, nor obligants selected, randomly.

Politically the point of rights is to establish the priority of the values or goals of certain individuals or groups over those of others. Rights talk has proliferated in recent years, much to the dismay of some philosophers.[123] Much of the political use of rights ignores one or more of the above caveats.

Rights are important. Even though they can be overridden in certain circumstances "their infringement will not easily be justified."[124] For if such infringements were easily justified a system of rights would have little meaning. It is important to remember, however, that rights are not omnipotent.

These caveats are important for the inherent rights debate. First, a recognition of aboriginal rights, especially as inherent rights, would put aboriginal peoples in an advantaged position. While these rights would be defeasible it would be incumbent upon Canadian governments to demonstrate how other considerations are more important.

This was the position adopted by the Supreme Court of Canada in *Sparrow*. In this case the court affirmed the existence of an aboriginal right, specifically the right to fish for food, as a constitutional right.[125] The court allowed that the Government of Canada could regulate this right, however this ability was circumscribed in two important ways. First, regulation of the right did not have the effect of extinguishing the right. Second, the court placed a burden of justification on the regulation of the right. In regulating this aboriginal right the Government of Canada had to demonstrate that the regulation was reasonable, that it did not impose undue hardship on the holders of the right, that the regulation did not deny the rights holders their preferred means of exercising the right, and that the regulation fulfilled a "valid legislative objective."[126] In this instance having their claim recognized as a right clearly conferred advantages to aboriginal peoples they would not have had otherwise.

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[123] Thomas C. Pocklington, "Against Inflating Human Rights". 2 *Windsor Yearbook of Access to Justice*. 1982. pp. 77-86.

[124] D. Lyons p. 127.

[125] *R v. Sparrow*. Canada, Supreme Court Reports (1990), Volume 1 p. 1116.

The second consequence of the above *caveats*, is that the exercise of those rights would be up to the aboriginal peoples that hold them. Certainly they would wish to exercise them. Still the situation is not cut and dried. The issue of resolving conflicting claims comes into play, as the test outlined by the court in *Sparrow* illustrates. As indicated above, however, aboriginal leaders recognize that resolving their claims will require negotiation. Negotiating from the position of rights holder, however, does have advantages.

Let us take the example of where a piece of land is being claimed. If the land is being claimed simply because a First Nation wants it the Canadian government would be within its rights in refusing the claim. Simple desire is no compelling reason to honour the claim. On the other hand the First Nation might claim the land based on need, perhaps they require it to build housing. In this case the government might seek to accommodate the First Nation but in some other way, building more housing on existing land or using a different parcel of land. Since the focus is on satisfying a need the government would have considerable leeway in determining the proper response.

However if the claim is based on an established right the government's options become fewer. Being a rights holder would mean that the First Nation is entitled not just to land but to the land in question. The government might wish to persuade the First Nation to accept something in lieu of the land - another piece of land, monetary compensation - but at this point it is up to the First Nation to agree. The government would have to provide a compelling reason for not honouring the claim in the way the First Nation wished.

These scenarios illustrate the difference in the relationship between the First Nation and the Government depending on whether the claim is based on desire, need, or right. In the first case the First Nation must rely on the Government's largesse; in the second on beneficence; in the third instance the Government is obliged to work out an agreement which is acceptable to the First Nation.

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[126] Kulchyski p. 231.

Another issue in rights discourse is that of conceptualizing the dynamism of rights. Rights can conflict with one another but they also give rise to new rights in new situations. The analytical question is, how does this come about ? The answers offered can be some of the most complicated in rights discourse, as anyone who has read L.W. Sumner can attest. The explanation offered by the advocates of inherent rights is, by comparison, more straightforward.

As explained above the existence of aboriginal title is seen as the source of a general right of self-determination. This right of self-determination in turn is the source of more specific rights, such as harvesting rights.

This explanation is similar to Joseph Raz's distinction between core and derivative rights.[127] In this relationship a given claim to a right (self-government) is derived from an acknowledged core right (aboriginal title). As such new rights (harvesting rights) can be created, depending on the circumstances, based on existing rights.

There is also some similarity between the language of inherent rights and the western concept of natural right. The doctrine of natural rights has a long history in western thought, though it has been subject to change. The ancient Greeks emphasized a natural law which took "precedence over the particular laws embodied in political institutions."[128] In the Middle Ages the concept of a rational moral order was put into the framework of Judeo-Christian theology. Once again a natural law was seen to take precedence over positive law. However this law was seen to be the work of a Christian God.[129] The 18th and 19th centuries saw the emergence of the idea that natural law and natural rights were deducible from reason. This conception was essentially formulated in defense of the individual against the state.[130]

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[127] Raz pp. 197-199.

[128] Norman E. Bowie and Robert L. Simon. *The Individual and the Political Order: An Introduction to Social and Political Theory* (second edition). Englewood Cliffs, NJ: Prentice-Hall Inc.. 1986. p. 51.

[129] Bowie & Simon p. 52.

Recent formulations see natural rights as morally fundamental concepts. They are natural in the sense that they are independent of any social or political order or the position one assumes in society. Furthermore (echoing Raz) they are seen as general rights which provide the foundation for more specific rights.[131]

Like the Medieval conception of natural rights inherent aboriginal rights are said to derive from a supreme being, not human rationality. They also share the modern version's emphasis on being transcendent and general. However the emphasis on rights handed down from the Creator puts this conception at odds with the modern version of natural right. In addition the utility of rights as a defense against the state is countered by the aboriginal belief that the rights holder is a carrier of responsibilities and not merely an imposer of duties on others.

However aboriginal people are not alone in attempting to draw a stronger connection between rights and responsibilities. Karmis has detected similarities between this approach and the liberal communitarianism of Charles Taylor. According to Karmis

> [Taylor] favourise une définition des droit individuels fondamentaux qui soit contrebalancée par un certain nombre de mesures, négatives et positives (devoirs civiques), en vue d'assurer le maintien et la vitalité de l'identité collective en question.[132]

Notice also that, as with the inherent rights approach, the existence of responsibilities is tied to the maintenance and vitality of the collective identity.

That inherent aboriginal rights inhere in the collective, and not the aggregate individual rights of its members, is one similarity between it and one branch of moral rights. Individual rights are the product of membership in a First Nation. This approach is the inverse of the liberal conception where the group's integrity is dependent on the rights of its individual members.[133] Unlike the collectivist conceptions in western thought, collective aboriginal rights do not allow that an individual can have rights independent of one's collective affiliation.

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[130] Bowie & Simon pp. 52-53.

[131] Bowie & Simon pp. 53-54.

[132] Karmis p. 89. I translate the passage as follows: "[Taylor] favours a definition of fundamental individual rights which are counterbalanced by certain measures, negative and positive (civic duties), with an eye towards assuring the maintenance and the vitality of the collective identity in question."

Practical Considerations.

The nature of the inherent aboriginal rights argument raises questions with regard to negotiations and agreements between First Nations and Canadian governments. Essentially these questions regard the values and ground rules which underlie the negotiation of aboriginal claims. The mere fact that claims are being negotiated might lead one to believe that aboriginal sovereignty is being affirmed. But there are differences between an agreement which affirms Crown sovereignty versus one that affirms original occupation.

As will be explained in greater detail in the next chapter, three of the most important components of comprehensive land claims are land, financial compensation, and political rights. At issue is not just how much aboriginal peoples will retain and receive but how they receive it and whether their historical priority is recognized.

With regard to land, questions arise not only with the amount of land which aboriginal peoples will control but also the manner in which it will be controlled. First among these questions is the issue of aboriginal title, specifically, whether negotiated agreements recognize underlying title as residing with aboriginal peoples or the Crown. The second question is whether agreements recognize that the Crown is acquiring title from aboriginal peoples. Recognizing aboriginal title does not mean that all land in a given claim area would have to be controlled by aboriginal peoples, only that a form of title originating outside the Anglo-Canadian legal system be recognized on the lands they retain.

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[133] Carmichael, Pocklington and Pyrcz. p. 204.

The situation is similar with regard to self-government. First, for the right of self-government to be recognized as an inherent right the existence and authority of aboriginal governments must be based entirely on a negotiated settlement. That is, First Nations governments can not be constituted under the *Indian Act* or a provincial or territorial municipal act. Second, it should be acknowledged that the negotiations are meant to articulate a right which has its origin outside Anglo-Canadian law. In other words the right is based elsewhere but is incorporated into, or accommodated within, the legal system of the dominant state. This requires legislation.

The issue becomes more complicated with regard to the areas of jurisdiction which an aboriginal government might exercise. The inherent nature of rights is meant to affirm the distinctiveness of aboriginal collectivities. Therefore self-government provisions should provide for a substantial range of jurisdiction, including those most crucial to the identity of the community, such as the delineation of the rights and responsibilities of the members of the aboriginal nation and the criteria for membership itself.

It is difficult to elucidate ways in which financial compensation might affirm inherent rights. The most obvious way would be for agreements to acknowledge that aboriginal nations are being compensated for economic losses due to the infringement of pre-existing rights. Compensation should also be extended to aboriginal nations, rather than individuals. This would recognize that the collective rights which are part and parcel of the inherent rights approach were the ones violated.

Another question has to do with the amendment of aboriginal rights, especially in an environment where different cultural values (Canadian v. aboriginal) come into conflict. Oren Lyons implies that because aboriginal rights are a gift from the Creator they are unalterable. At one point Wilson suggests that "no generation or special group has the right to sign away the rights of any future generation." This is a conservative approach which gives rise to a practical question. If aboriginal rights are unalterable can aboriginal and Canadian rights conceptions be reconciled ?

The conservative approach is not universal amongst aboriginal rights advocates. Snow, Ittinuar, Chartier, and even Wilson say negotiations are necessary to identify, define and implement aboriginal rights. The reality is that settlements will create binding obligations for future generations. That is the way it has always been and it is hard to see how it could be otherwise. Descendants will be entitled to negotiate their own agreements with Canadian governments but previous agreements will shape the context of those negotiations. The important point for Snow, Ittinuar, Chartier, and Wilson is that consent be the means of accommodation between aboriginal and non-aboriginal perspectives.

Do inherent rights accord to aboriginal peoples special rights and status ? In a sense they do not. If we follow Youngblood Henderson, for example, we see aboriginal rights as universal human rights. In this way many of the rights being claimed, the right to self-determination for example, are no different than the rights claimed by other nations. What makes aboriginal claims unique is not necessarily the rights claimed but the position from which they are claimed. In order to understand this we must revisit Youngblood Henderson.

Part of his piece deals with the development of aboriginal rights in the domestic law of the United States. Here he discusses the decision of Chief Justice Marshall in *Johnson v M'Intosh*, a case tried in 1823. What is important for our purposes is that

> Marshall referred to Indian tenure as a 'right of occupancy' to stress the fact of international recognition of tribal tenure and possession as distinguished from prescriptive European 'title', that is, jurisdiction acquired by discovery.[134]

There are four ways of legitimately acquiring title in international law: discovery (claiming unoccupied territory), occupancy (being the original occupants of a territory), cession (acquiring a just transfer from the occupants of a territory) and conquest (taking territory by force).[135]

If all these ways of acquiring title are equally valid and if, as Locke stated, "[i]ndependent states were equal" aboriginals are in a position to claim their rights collectively as the original occupants of the land. As such aboriginals have the right to exercise their rights independently inside or outside of the Canadian federation.

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[134] Youngblood Henderson p. 205.

[135] Youngblood Henderson notes that Hugo Grotius disputed the legitimacy of conquest [pp. 190-191]. He also notes that under British common law "all consensual possession of land, not by inheritance, was by the 'dominion of conquest'" [p. 192].

A Critique of Inherent Aboriginal Rights.

There are some important questions which must be asked regarding the argument that aboriginal rights are inherent rights. The first question has to do with the spiritual basis for aboriginal claims. Basing the inherent nature of aboriginal rights on spiritual claims presents problems empirically, philosophically, and politically.

Spiritual claims based on the will of a supreme being are simply impossible to verify. Such claims are based on faith, not physical evidence or logical argument.

Philosophically one must ask, how does one decide where the Creator's will begins and ends ? It may be that the fact that the Creator placed aboriginal peoples in North America gives an indication of the Creator's will with regard to who should control the land. But what role did the Creator play in the migration of Europeans to North America and the subsequent subjugation of aboriginal nations ? Is this a further indication of the Creator's will ? Again the empirical question looms: How do we know if it is or if it is not ?

Politically, basing aboriginal rights on spiritual claims raises the possibility that non-aboriginal people will have trouble comprehending them. Western societies have, for the past few centuries, moved away from the idea that their political institutions or their rights are derived from a divine grant. Most existing monarchies derive their legitimacy from a constitution and not "the divine right of kings." Furthermore the western conception of the role of rights is usually associated with the exercise of personal or collective liberty, or the maintenance of social order, rather than the achievement and maintenance of a certain lifestyle.

Non-aboriginal people might well respond with spiritually-based claims of their own: that they are divinely inspired to "go forth and multiply" and "subdue the earth" in the process, thus providing a justification for appropriating the lands of aboriginal peoples. Basing rights claims on spiritual claims only serves to impede, not facilitate, accommodation and negotiation.

Similarly the idea that aboriginal rights are inherent rights should not rest upon cultural or economic practices that are particular to aboriginal societies. In other words aboriginal communities need not assume a certain *form* in order to claim aboriginal rights. An aboriginal community may decide, for whatever reason, to adopt Canadian-style democracy (majoritarianism balanced with guarantees of individual rights) rather than a traditional consensus process for internal political matters. Another aboriginal community might adopt economic development initiatives more in keeping with the values of a market-oriented, capitalist economy rather than those of a harvesting economy, with all that might entail for the environment. This, however, is a matter of choice rooted in a right of self-determination and is not a criterion for determining whether such a right exists.

Ittinuar has stated that aboriginal peoples claim "the right to benefit from...new forms of wealth."[136] YFN leaders have also emphasized that the inclusion of economic development provisions in the UFA is meant to ensure that YFNs are able to pursue traditional and non-traditional economic practices.[137] Should aboriginal rights as inherent rights be adversely affect by these kinds of choices ?

One of the things aboriginal leaders have repeatedly fought against is the position sometimes taken by Canadian governments, that the adoption of elements of a western lifestyle by aboriginal peoples represents an abandonment of aboriginality. This alleged abandonment of aboriginality is sometimes used to delegitimize claims to aboriginal rights. How can people claim aboriginal rights, so the argument goes, if they are living similarly to their non-aboriginal neighbours ?

There are two ways to deal with this argument. The first is to counter it, which Asch does in his critique of the decision of Mr. Justice McEachern in *Delgamuukw v. The Queen*. Asch criticizes McEachern's uncritical acceptance of "acculturation theory", which, he says "provides a very static view of culture." Furthermore "the premises of acculturation theory...are poorly confirmed by fact." Traditional practices, such as hunting, remain important to aboriginal peoples even where elements of a western lifestyle have been adopted. Acculturation theory also ignores the fact that "institutions may become suppressed and apparently abandoned under certain political and economic conditions only to arise once again when conditions change." In short the static view is not in keeping with "recent developments in the understanding of the process of cultural change."[138]

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[136] Ittinuar p. 50.

[137] Interview with Paul Birckel, Chief, Champagne-Aishihik First Nations, August 31, 1993; Interview with Dave Keenan, Chief, Teslin Tlingit, Council, August 5, 1993.

The second approach is to simply abandon the idea that "native forms of community" are anything other that the forms of community that aboriginal collectivities choose to adopt. Non-aboriginal Canadians do not define themselves as "more or less Canadian" based on the adoption of technologies or economic practices that originated elsewhere. We see ourselves as free to adopt practices that, in our view, will make our lives better. We see our lifestyle as capable of evolving. We should not view the situation of aboriginal peoples differently.

My critique is not meant to suggest that aboriginal claims regarding the will of the Creator or the type of relationship aboriginal peoples have with the land are not true. The point is that they do not provide a sound basis for resolving claims against the dominant society.

In my view proponents of inherent rights should take a more economical approach. The major advantage of this approach is that it is based on values which are common to aboriginal and non-aboriginal views regarding political order.

Michael McDonald has borrowed Robert Nozick's "entitlement theory" in constructing his own theory of aboriginal rights.[139] Entitlement theory focuses on two points. The first is establishing how one might come to own things, what Nozick called

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[138] Michael Asch, "Errors in Delgamuukw: An Anthropological Perspective" in Cassidy (ed.), ***Aboriginal Title in British Columbia: Delgamuukw v. The Queen***. pp. 231-235. Asch also notes that the Supreme Court of Canada rejected a static view of culture in its decision in *Sparrow*.

[139] Michael McDonald, "Aboriginal Rights" in Wesley Cragg (ed.), *Contemporary Moral Issues* (second edition). McGraw-Hill Ryerson Limited. Toronto. 1987. pp. 358-359.

"justice in holdings." The second is indicating how an argument based on entitlement is different than one based on considerations of welfare.

Nozick believed that there are two ways in which one might claim a just holding of property, First, to acquire something that was previously unowned, "justice in the original acquisition of holdings". Second, to acquire something from someone else, "justice in the transfer of holdings."

But as McDonald points out questions can arise as to whether original acquisition or a transfer was just. The process for answering such questions is historical: one traces backward from the current owner to determine whether all transfers, if any, were just. If they were the current owner can claim clear title to the property in question. If they were not current ownership, or title, can be questioned and some form of restitution might be required.

Applying entitlement theory to aboriginal claims McDonald concludes that "[a]boriginal rights are none other than original acquisition rights which haven't been [justly] transferred to anyone else."[140] This, I believe, provides the foundation for a claim of inherent aboriginal rights.

If we focus on original acquisition rights it does not matter whether that just holding was the result of the will of the Creator or whether it was the result of historical circumstance. The fact is that the land belonged to aboriginal peoples, to the extent that it belonged to anyone, when Europeans first came to North America.

Some would argue that an argument based on "we were here first" does not, and should not, entail very much with regard to title to land and a broad range of individual and collective rights. I disagree.

Aboriginal societies had an established order in North America. Their concepts of land tenure and political rights were different than those of Europeans but served the same function, to establish order within and between societies. To argue that aboriginal peoples should not be considered owners of the land or holders of rights, simply because their approaches to ownership and rights differed from those of the Europeans, is to presume that the European view was superior and to penalize aboriginal peoples for having different views and practices.

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[140] McDonald, "Aboriginal Rights", p. 359.

European nations also desired order. As Youngblood Henderson argues, the development of law - domestic and international - and the concept of rights is testimony to that. Given this state of affairs it seems to me incumbent upon the Europeans who came to North America to respect the status quo. Respecting the status quo, in my view, requires that the existing order not be altered without the consent of those practising it.

In this sense recognizing aboriginal rights as inherent rights means recognizing that the means of regulating aboriginal societies did not originate with European legal and political systems. As such those means of regulation are not unilaterally alterable by settler states, such as Canada. Consent is the only legitimate means of regulating aboriginal, non-aboriginal relations.

Conclusion.

Some might argue that advocating an inherent rights approach means pretending that the last few hundred years of history had never happened. The historical record indicates that aboriginal, non-aboriginal relations have not always been governed by consent. There is no doubt that current negotiations can not avoid the political, economic, social, and cultural context which has evolved since contact. Yet despite some conceptual problems and the historical realities, recognizing that certain aboriginal rights are inherent rights is useful for three reasons.

First, the term distinguishes these rights from others (treaty rights and constitutional rights, for example) that aboriginal peoples claim under Canadian law. Second, it serves to distinguish these rights within Canadian society as collective rights which may be legitimately claimed due to the historical relationship between aboriginal peoples and the Canadian state. Third, it explains the nature of those rights. It acknowledges that the legal instruments which protect those rights in Canadian law did not create them; that by either international or common law, or normative argument they have always existed. Instruments of law merely recognize and protect them.

This analysis and critique shows two things: first, that the concept of inherent rights is not incomprehensible; second, that it indicates something about the nature of rights, generally, which could be incorporated into western conceptions of rights.

I indicated above that the Anglo-Canadian legal tradition and the western philosophical tradition refer to rights in different ways. However these different terms don't simply indicate different rights, they are often matched in contrasting pairs which illustrate different characteristics of rights. Focusing on characteristics of rights indicates that the idea of an inherent right can fit with other, accepted ways of referring to rights.

For example, legal rights are contrasted with moral rights. What this pair illustrates is the different ways in which rights are enforced: legal rights are enforced by legal sanctions and institutions; moral rights are enforced by individuals and groups that subscribe to certain social norms.

Similarly, natural rights are contrasted with conventional rights. That is, rights which are said to emanate from the natural state of human existence, or human rationality, are contrasted with those that are acknowledged to be constructions based on pragmatic considerations.

This brings us back to the inherent rights-contingent rights continuum referred to by Asch and Macklem. Here the question to be addressed is the locus of the origin of rights, do they originate within the society that seeks to exercise them or do they originate elsewhere ? The answer to this question will indicate where the authority to modify, and the responsibility to protect, rights rests.

At first glance it may seem that all rights originate with the societies that seek to exercise them. However in Canada's case this has not always been the situation. Prior to Confederation the Canadian colonies could be said to have exercised contingent rights since the rights of the colonists were dependent on acts of the British Parliament for the establishment, legitimation, and protection of local institutions. This situation changed gradually as colonial legislatures, and later the Canadian Parliament, gained a greater degree of responsible government.

What this illustrates is that any society which is in a colonial state could be said to exercise contingent rights. The current situation of Hong Kong is a case in point. The fate of this colony is a matter to be resolved between Great Britain and the Peoples' Republic of China. The citizens of Hong Kong are not in a position to decide their fate for themselves.

This analysis points to three dimensions of inherent aboriginal rights: the historical, the matter of principle, and the matter of inherent aboriginal rights in practice. The fact that aboriginal societies originated and developed in North America before contact with Europeans indicates that as an historical fact the system of rights and obligations which developed in those societies is inherent to those societies. As a matter of principle, therefore, aboriginal rights ought to be recognized as inherent unless aboriginal societies agree to a different arrangement. As a matter of practice the concept of inherent rights is linked to autonomy, the actual ability of individuals and collectivities to control their destinies. That is, the greater the degree of autonomy that aboriginal societies can exercise the greater the degree to which the inherent nature of aboriginal rights is retained.

These dimensions, however, are not linked in some automatic way. That is, the recognition of the historical fact of the inherent nature of aboriginal rights does not necessitate the recognition of aboriginal rights as inherent in principle. Nor does this entail any particular degree of autonomy, or any specific set of powers. One of the fundamental characteristics of collective autonomy is the ability to make agreements which may modify the manner in which groups exercise their rights.

For example an agreement between Canadian governments and an aboriginal nation could recognize that nation's rights as inherent as a matter of historical fact. The same agreement could, however, indicate that as a matter of principle those rights are now legitimated by Canadian law. Similarly the degree of autonomy could be rather modest, with provisions for expanding that degree of autonomy at some point in the future.

Another agreement might not only recognize a nation's rights as inherent as a matter of historical fact but also that in principle those rights are legitimated by the aboriginal nation itself. But, in practice, the aboriginal nation might choose to delegate all governing authority, at least for the time being, to Canadian governments.

This is not to say that the concept of inherent aboriginal rights is an empty vessel, waiting to be filled through negotiation. Rather, it means that the recognition of aboriginal rights as inherent rights is not an all or nothing proposition; although it could be argued that there must be some minimum threshold at which it becomes meaningless to refer to rights as inherent as a matter of practice.

I will consider matters of historical fact, matters of principle, and matters of practice in determining the extent to which the UFA recognizes the rights of YFNs as inherent rights.

Chapter Three

The Council for Yukon Indians Umbrella Final Agreement

"Hello self-government, good-bye Indian Affairs !"

That was the reaction of Robert Hager, Chief of the First Nation of Nacho Nyak Dun, when the UFA was signed at a public ceremony in Whitehorse on May 29, 1993.[141] Also signed that day were the final and self-government agreements for four of the Yukon's 14 First Nations: the Teslin Tlingit Council, the Champagne and Aishihik First Nations, the Vuntut Gwitchin First Nation, and the First Nation of Nacho Nyak Dun. The enabling legislation for these agreements was proclaimed on February 14, 1995, 22 years to the day after the Yukon Native Brotherhood presented its statement of claim, *Together Today For Our Children Tomorrow*, to the Government of Canada.[142]

Yukon Indians have always based their claims against the Government of Canada on rights, rather than considerations of individual and collective welfare. Yukon Indians believe that the resolution of their claims to their satisfaction will improve their individual and collective welfare. But at the root of these claims is the idea that as the original occupants of the Yukon they have the right to be dealt with collectively and that by right their consent is required in the determination of the future of the Yukon.

The purpose of this chapter is to analyze the UFA and determine the extent to which it fulfils the requirements of an inherent rights approach, as outlined in Chapter Two. I will focus on the UFA even though it is the final (or settlement) agreements and the self-government agreements, and not the UFA, that will actually detail the rights to be exercised by YFNs. However the UFA provides the framework under which the final and self-government agreements will be negotiated. Hence anything which will be contained in these agreements has to be allowed for by the UFA.

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[141] "Goodbye Indian Affairs", *Yukon News*, June 2, 1993, p. 3.

[142] Rudy Platiel, "Land-claims accord to be proclaimed for Yukon residents", *The Globe and Mail*, February 14, 1995, p. A2.

The Umbrella Final Agreement: Process.

As stated above the recognition of aboriginal rights as inherent rights places the relationship between aboriginal peoples and Canadian governments in a different context than if those rights are seen as contingent on the Canadian legal and political system. In broad terms the inherent rights approach emphasizes that aboriginal peoples, and hence their rights, are *apart from* the Canadian legal and political system. The contingent rights approach maintains that aboriginal peoples are *a part of* that system.

We can see indicators of the degree to which YFNs are a part of, or apart from, the Canadian legal and political system in the outcome of negotiated agreements but also in the way in which agreements are negotiated. This leads to the question: Does the process by which the UFA was negotiated reflect a recognition that aboriginal rights are inherent rights ?

Two requirements are necessary, though not sufficient, to constitute such recognition. The first is that the rights of YFNs would be determined by consent. The existence of consent would indicate that the parties treated each other as formal equals. The second requirement is that the agreement be negotiated bilaterally between YFNs and the Government of Canada. If YFNs are apart from the Canadian legal and political system then they would not be directly involved in resolving matters internal to that system, such as determining the powers of regional governments, like the Government of the Yukon, or resolving questions of third party rights. These would be up to the Government of Canada to resolve with its own citizens. Conversely the Government of Canada would not be involved in matters internal to YFNs, such as the ratification of agreements.

When negotiations began in 1973 the Government of Canada and the CYI were the only parties to the negotiation. The Commissioner of the Yukon was responsible for upholding the Yukon's interests in the negotiations as a member of the federal negotiating team.[143] However, from the beginning the Yukon Territorial Council expressed an interest in participating in the negotiations.[144] Eventually elected members of the territorial council became involved in representing the territory's interests.

A Memorandum of Understanding (MOU), issued in February 1979, stipulated that territorial representatives would participate fully in the negotiations and that the Government of the Yukon would be a signatory to the final agreement. Responsibility for land claims negotiations was also delegated from the Commissioner to the Government Leader.[145] This change came in the wake of the November 1978 territorial general election in which candidates, for the first time, ran as members of political parties. This change also preceded, by eight months, a letter of instruction to the Yukon Commissioner from the Minister of Indian Affairs and Northern Development which effectively provided the Yukon with responsible government.[146]

However the Yukon's participation would still be as part of the federal team, ultimately under the direction of the DIAND minister. Furthermore whatever agreements were reached would not be "conditional on the signature of the Government of the Yukon."[147] This was the situation through the first phase of negotiations which ended with the rejection of the Agreement-in-Principle (AIP) in 1984.

Movement to resuscitate negotiations began after the May 1985 election of the territorial NDP. The first concrete result of this change was the issuance, in November

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[143] Interview with James Smith, Commissioner of the Yukon Territory, 1966-1976, August 30, 1993.

[144] "Council Wants in on Talks", *Whitehorse Star*, February 16, 1973, p. 1.

[145] Copy of 1979 Memorandum of Understanding and amending letter respecting the Yukon Indian Land Claim Process. LCS file LC 87-161.

[146] Kirk Cameron and Graham Gomme, *The Yukon's Constitutional Foundations, Volume II: A Compendium of Documents Relating to the Constitutional Development of the Yukon Territory*. Northern Directories Ltd. Whitehorse. 1991. pp. 159-162.

[147] 1979 Memorandum of Understanding and amending letter. LCS file LC 87-161.

1985, of a new MOU which "[set] out the process and guidelines to recommence land claim negotiations." The MOU indicated that unlike the previous process this one would allow for "the implementation of part or all of the agreements, during the negotiation process", would provide a regional structure to the negotiations and allow individual YFNs to negotiate their claims. Furthermore working groups would focus on different issues to "enable progress to occur on many different issues at the same time." The MOU also recognized that "all parties have an essential and separate role in the negotiation process."[148] From then on the Yukon would negotiate as a separate party, rather than as part of the federal team.

Many of these changes resulted from the appointment of Barry Stuart as chief negotiator for the Government of the Yukon in 1985. However his concern was not simply with the institutional relationship between the parties. He was also concerned with the approach the parties were taking to the negotiations. In his view a tremendous

> amount of adversarial attitudes...had been built into the process over 13 years...Everybody came to the table thinking "I'm going to smoke the other side." Everybody came to the table thinking the other side wasn't being fully open and divulging what they had to give or what they really wanted. So you always asked for twice as much as you thought you were going to get and you always offered half of what you thought you were ultimately going to need to give. And it became a game of looking for a compromise that made both sides look good...[149]

even though this compromise might not have served the best interests of any of the parties. But then,

> It wasn't a best interests kind of negotiations, it was who can demonstrate more powers at the table to be able to out-wit or out-fox the other side.[150]

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[148] Press releases - Land Claim. LCS file LC 87-41.

[149] Interview with Barry Stuart, Chief Negotiator, Government of the Yukon, 1985-1989, August 17, 1993.

[150] Barry Stuart, August 17, 1993.

Stuart suggested that the parties adopt a *principled negotiations* approach that had been developed by the Harvard Negotiations Project.[151] This method of negotiation seeks to

> decide issues on their merits rather than through a haggling process focused on what each side says it will and won't do. It suggests that you look for mutual gains whenever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side...Principled negotiations...[enable] you to be fair while protecting you against those who would take advantage of your fairness.[152]

According to Stuart

> [o]ne of the key features of an interest based negotiation is respect for the different values of the other person. You don't have to accept them but you have to respect them.[153]

In a principled negotiations process a lot of time is spent "trying to understand what the other person really wants...why do they want it ?" This should engender respect for that interest, why it exists, and the person who puts it forward. This, in turn, should form the basis of understanding the other side and respect for the rights being claimed. The rights claimant also begins to realize that their position will have to change in order to co-exist with others. The focus, then, is on what is fundamental in order that the parties be able to live together in the way they wish: "Everybody finds out accommodations can be made."[154]

Stuart "had a bias towards non-adversarial, non-lawyer dominated negotiations" before accepting the chief negotiator's position. He also believed that the principled negotiations process was suited to claims negotiations because there were so many interests - land, jurisdiction, compensation - involved. In principled negotiations the more interests that are involved the more room for manoeuvre the parties have. This "create[s] a much more fertile negotiating environment."[155]

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[151] The Harvard Negotiations Project is "a research project at Harvard University that works on negotiation problems and develops and disseminates improved methods of negotiation and mediation." Roger Fisher, William Ury and Bruce Patton, *Getting To Yes: Negotiating Agreement Without Giving In* (second edition). Penguin Books. Toronto. 1991. p. 199.

[152] Fisher, Ury and Patton, p. xviii. Because of the focus on interests, the principled negotiations process is also referred to as *interest-based negotiations.*

[153] Barry Stuart, August 17, 1993.

[154] Barry Stuart, August 17, 1993.

Stuart's rationale for advocating a principled negotiations approach was also based on the fact that previous negotiations had failed to reach an agreement. He wanted to ensure that the negotiators "didn't repeat the same mistakes and extend [the negotiations] for another 13 years."[156]

Chris Knight, who succeeded Stuart as the Yukon's chief negotiator, has described four features of the principled negotiations process as it was applied in the UFA negotiations. The first feature is a "focus on interests, not positions." This placed "a high value on the integrity of the relationship among parties both during and after the negotiations."[157] This feature recognized that the negotiations are not designed to end the relationship among the parties but to provide the foundation for a continuing relationship.

The second feature was that the negotiations process was "community-based." This allowed negotiators, and members of the general public, to have direct access to one another. This, hopefully, would engender a better appreciation of each other's position.[158] This principle is also reflected in the UFA in that the self-government provisions allow for agreements to be negotiated at the local level according to the interests and capacities of each community.

Among Yukon Indians there was a feeling that there was not enough community involvement in the negotiations to 1984. Most of the negotiations did not even take place in the Yukon: Toronto, Vancouver, and Ottawa were the preferred venues. There was also quite a bit of secrecy on behalf of the negotiators on all sides as to how agreements were arrived at.[159] Concerns about the pace and secrecy of the negotiations were raised early in the process and letters to the editor and editorials in the *Yukon Indians News* reflected these concerns.[160] The adversarial and secretive nature of the previous negotiations process was considered by many interviewees as one reason the 1984 AIP was not ratified.

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[155] Barry Stuart, August 17, 1993.

[156] Barry Stuart, August 17, 1993.

[157] Chris Knight in Frank Cassidy (ed.) *Reaching Just Settlements: Land Claims in British Columbia*. p. 67. Knight was chief negotiator from 1990-1991.

[158] Knight in Cassidy (ed.) *Reaching Just Settlements*, p. 67.

The third aspect was that the process would be "open." This meant that persons whose interests would be affected by the agreement could participate, in one form or another, in the negotiations.[161]

The final characteristic of the negotiations process was "that in the absence of a pipeline, hydro project, or similar development, timelines were necessary to impose discipline."[162] One might argue that the fact that it took 20 years to finalize the UFA indicates that the parties were not successful in imposing temporal discipline. In fact negotiations continue with those YFNs who have yet to conclude final and self-government agreements.[163] However it must be kept in mind that this process only went into effect in 1987.

When analyzing the degree to which negotiations processes affirm an inherent rights relationship the key factor is the degree to which the aboriginal peoples involved were treated as apart from, rather than a part of, the Canadian legal and political system. The history of the UFA process indicates that to the extent that an inherent rights relationship existed between YFNs and the Government of Canada in 1973 it became less so over time.

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[159] Interview with Victor Mitander, Chief Negotiator, Council for Yukon Indians, September 1, 1993.

[160] See for example "Negotiations Going Too Fast" letter to the editor by Edi Bohmer, *Yukon Indian News*, February 4, 1976, p. 2. Letter to the editor by Lula Penikett-Johns, *Yukon Indian News*, June 2, 1976, p. 2.

[161] Knight in Cassidy (ed.), *Reaching Just Settlements*, p. 68.

[162] Knight in Cassidy (ed.), *Reaching Just Settlements*, p. 66.

[163] Since May 1993 the Ta'an Kwach'an First Nation, the Little Salmon-Carmacks First Nation, and the Selkirk First Nation have concluded negotiations. Their agreements are not yet signed.

The consent of YFNs for the ratification of agreements has always been maintained. However other parties became involved in the negotiations. First it was the Government of the Yukon which went from being part of the federal team to becoming party to the negotiations and eventually a signatory to the agreements. The principled negotiations process also allowed third parties to become involved.

The outcome of the UFA negotiations shows that it was the negotiations conducted under the more open process, the process less cognizant of an inherent rights relationship, which produced an agreement. The reasons for this will be taken up in the next two chapters.

Still, one must keep in mind that even a process which treated YFNs as apart from the Canadian state would not entail a specific outcome. Theoretically aboriginal peoples are within their rights to negotiate any particular set of arrangements: from total assimilation to total independence. Of course what they will actually negotiate will be limited, by their own demands and the context in which they must negotiate.

The Umbrella Final Agreement: Content.

In analyzing the content of the UFA what is at issue is the degree of autonomy which YFNs will be able to exercise in their new relationship with the Canadian state.

Before analyzing the content of the UFA one must have a framework for evaluating it. Given their complexity analyzing comprehensive claims agreements is a daunting task. Michael Whittington, however, has developed a framework which makes it easier. Whittington points out that comprehensive claims negotiations focus on three central factors: the ownership and control of land, financial compensation, and political rights.[164]

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[164] Michael S. Whittington, "Political and Constitutional Development in the N.W.T. and Yukon: The Issues and the Interests" in Michael S. Whittington (ed). *The North*. Ministry of Supply and Services Canada. Ottawa. 1985. pp. 81-82. The volume was one of a series commissioned as part of the research program of the Royal Commission on

Land.

"[T]he land holds a central place in the social, economic and spiritual lives of the native peoples", writes Whittington, and as such is their dominant concern. Though the importance of this principle is clear the actual negotiations over land can become quite complex. At issue is how much land aboriginal peoples will control and how they will control it. Until the UFA negotiations aboriginal peoples were faced with two choices: outright ownership based on fee simple title, and the use of land for traditional pursuits without actually owning it, otherwise known as usufructuary rights.[165]

At a second level the issue becomes even more complex. Even where aboriginal peoples acquire fee simple ownership it must be determined whether that ownership extends to subsurface rights or is restricted to surface rights. Another issue is whether the land is alienable: Can it be sold, expropriated, or confiscated ? Must aboriginal peoples share access to lands where they have usufructuary rights ? These issues can only be resolved through negotiations and experience so far indicates that the results will vary from one area to another.[166]

The UFA states that the objective of Chapter 9 (Settlement Land Amount) is to

> recognize the fundamental importance of land in protecting and enhancing a Yukon First Nation's cultural identity, traditional values and life style, and in providing a foundation for a Yukon First Nation's self-government arrangements.[167]

This statement is a good example of how the concept of aboriginal rights is dealt with in the UFA. Notice that what is provided is an "objective" of negotiations, not a rationale for negotiations. Rights are not explicitly mentioned in the objective. Government, then,

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the Economic Union and Development Prospects for Canada. Whittington served as the Government of Canada's chief negotiator for the CYI claim from 1987-1992.

[165] Whittington p. 81.

[166] Whittington p. 81.

[167] *Umbrella Final Agreement between The Government of Canada, The Council for Yukon Indians and The Government of the Yukon.* Published under the authority of the Hon. Tom Siddon, P.C., M.P., and Minister of Indian Affairs and Northern Development. Minister of Supply and Services Canada. Ottawa. 1993. Section 9.1.1, p. 81.

can take the position that it is recognizing "the fundamental importance of land" to YFNs without admitting that YFNs have a right to the land.

Still, the importance of land as a means of supporting cultural identity, traditional values and lifestyle, and as a basis for self-government strongly reflects the language of inherent rights.

On the one hand articulating an objective which does violence to neither philosophical perspective can be seen as masterful drafting. On the other hand the fact that two different interpretations of the same passage are allowed to co-exist could provide the basis for conflict later on.

In order to fulfil its objective the UFA provides for up to 16,000 square miles (41,439.81 square kilometres) of the Yukon to be divided among the 14 YFNs.[168] Of this amount no more than 10,000 square miles (25,899.88 square kilometres) may be Category A Settlement Land.[169] According to the UFA Category A Settlement Land includes both surface and sub-surface rights whereas Category B Settlement Land includes surface rights only. However Category B land may also include the right to "Specified Substances" where that is negotiated.[170]

In addition Yukon Indians and YFNs have a right of access to "enter, cross and stay on Crown Land" for both commercial and non-commercial purposes subject to a number of conditions. These conditions relate to: damage that might be done to the land; that the route taken be one traditionally used by Yukon Indians; and the nature of the access (i.e. the exercise of a harvesting right).[171] The issue of access cuts both ways, however, and the Government of Canada, the Government of the Yukon, and individuals generally may have access to Settlement Lands under specific conditions detailed in the UFA.[172]

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[168] This amount constitutes approximately 8% of the territory's land surface. For the distribution of land among YFNs see page 85 of the UFA.

[169] UFA, section 9.2.2, p. 81.

[170] UFA, section 5.4.1.2, p. 45.

[171] UFA, section 6.2.1 to section 6.2.2.2, pp. 60-61.

The UFA also indicates that Settlement Land is alienable. Chapter 7 deals with the procedures involved in expropriating Settlement Land.[173] There are also provisions regarding the status of settlement land which has been sold or expropriated and subsequently reacquired.[174]

Financial Compensation.

The second major component in a comprehensive land claim is the determination of financial compensation and economic benefits for aboriginal peoples. Whittington offers five justifications for compensation:

> 1. Compensation should be made for the value of natural resources extracted from lands prior to settlement agreement.
>
> 2. Aboriginal peoples should receive "retributive and reparative" compensation, "based on the assumption that the non-native society should pay for the negative social impacts it has had on the native community." This not only requires compensation for past damages but also the establishment of programs to ensure that aboriginal peoples will be able to participate fully in society in the future.
>
> 3. Financial transfers to aboriginal peoples are simply "an extension of the redistributive function that government's perform in all liberal democracies." It is also true, however that aboriginal peoples argue for special programs designed for them specifically.
>
> 4. Aboriginal peoples argue that they should receive a share of natural resource rents accruing in the territory at large.

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[172] UFA, Chapter 6 - Access, pp. 59-66.

[173] UFA, Chapter 7 - Expropriation, pp. 67-74.

[174] UFA, section 5.11.0 and section 5.12.0, p. 54.

> 5. In addition they argue for tax exemptions for aboriginal development corporations and their investments and/or "preferential treatment for native corporations tendering for government contracts."[175]

Of these reasons only the first and fourth can be said to relate to an inherent right. The Government of Canada might not recognize inherent rights as the justification for such compensation but one could make the argument that it is. The first, for example, implies very strongly that an agreement should have been reached before resources were extracted from aboriginal lands and that the federal government, rather than individuals or corporations, is responsible in the absence of an agreement. Government could counter this, however, by indicating that the requirement of compensation is contained in the common law. Still, both the first and fourth justifications treat aboriginal peoples collectively and differently than other Canadians.

In contrast the other reasons seem to legitimate government control within established programs and jurisdictions. Regardless the determination of how much compensation aboriginal peoples will receive, and in what form, will vary from claim to claim and will, in Whittington's view, be determined more by "hard horse-trading, and by the relative perceived urgency of coming to an agreement" than by "rational debate."[176]

The economic provisions of the UFA are a complex series of give and take. On the give side is the financial compensation of $242.673 million in 1989 dollars. This amount is to provide "for all comprehensive claims in Canada by Yukon Indian People whether they are settled or not at the time of a Yukon First Nation Final Agreement."[177] Also on the give side is a series of commitments to improve the economic conditions of YFNs. Chapter 22 (Economic Development Measures) guarantees that, in addition to financial compensation, YFNs and Yukon Indians will have access to "economic development programs of a general application to a Yukon resident and a Canadian citizen."[178] The chapter also indicates that Canadian governments and YFNs will use the settlement agreements to encourage economic development at the local level and enhance employment opportunities for Yukon Indians.

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[175] Whittington pp. 81-82. The fifth "justification" really is not a justification at all. It is a form of compensation.

[176] Whittington p. 82. The principled negotiations approach is meant to reduce the effect of "hard horse-trading" and "urgency". In the Chapter Five I will discuss how effective this approach was in dealing with such factors.

[177] UFA, section 19.2.1, p. 215.

Chapter 23 also establishes a formula by which YFNs will receive resource royalties from the Government of the Yukon as the Government of Canada devolves authority to collect these royalties to the territorial government.[179] On the other hand, nothing in the chapter imposes any additional financial obligation on government. And while efforts will be made to inform YFNs of, and include them in, the process of awarding government contracts they will not receive preferential treatment in the tendering process.[180]

On the take side is the fact that the value of the financial compensation will be decreased by the value of loans (and any interest accrued by these sums) made to the CYI or YFNs by the Government of Canada. One source of loans is the interim benefits extended to Yukon Indian Elders. In June 1980 the CYI and the Government of Canada reached an agreement whereby Yukon Indian Elders (defined as persons over sixty years of age) would receive $150 per month. This agreement was the first lasting agreement regarding compensation for Yukon Indians.[181] It was important because it was an act of good faith on the part of the federal government[182], it provided tangible benefits, and it demonstrated that agreements could be reached.

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[178] UFA, section 22.2.2, p. 249.

[179] UFA, section 23.2.0, pp. 256-257.

[180] UFA, Chapter 22, pp. 249-254.

[181] This agreement remained in existence for the duration of the negotiating period.

[182] Jonathan L. Pierce, *Indian Land Claims in the Yukon, 1968-1984: Aboriginal Rights as Human Rights*. Unpublished Masters Thesis. Carleton University. Ottawa. p. 128.

The second source of loans is those made for the purpose of negotiating agreements-in-principle and settlement agreements.[183] YFNs are especially concerned about the cost of loans accumulated through the negotiations process. They are concerned because the estimated cost of these loans exceeds $60 million and because Yukon they believe that the federal government should bear the full cost of negotiations since the purpose of the negotiations is to remedy transgressions against their rights by the Government of Canada. As Dave Keenan put it YFNs have had

> to borrow $60 million against our compensation to pay for their fiduciary obligation. Does that make sense ? Not to me it doesn't.[184]

When calculating the impact of compensation it must be remembered that it will be paid out over a period of 15 years. This means that the compensation will continue to earn interest over the course of the payment schedule. However this also means that YFNs will not get their entire allotment in one lump sum. In addition Section 87 of the Indian Act will be repealed as regards YFNs. This means that Yukon Indians will begin paying taxes to Canadian governments. However this stipulation will not go into effect until three years from the effective date of settlement legislation. For giving up this right YFNs will be compensated by a one-time payment of $26.57 million.[185]

Political Rights.

The third factor in interpreting comprehensive claims agreements is the delineation of political rights for aboriginal people, other than those they enjoy as Canadian citizens, as well as a definition of the relationship between aboriginal peoples and Canadian governments. Aboriginal peoples argue for institutional guarantees of their participation in the making of decisions that affect them. There are, however, a variety of ways in which this can be achieved. These can include:

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[183] UFA, section 19.1.0, p. 215.

[184] Interview with Dave Keenan. This issue will be discussed in more detail in Chapter Five.

[185] Carol Geddes and Bruce Cottingham (co-editors), *Understanding The Yukon Umbrella Final Agreement: A Land Claim Information Package* (third edition). Prepared under the direction of the Council for Yukon Indians Land Claims Department. No publication date is given however the information contained in the package is based on the UFA as of March 31, 1990. p. 72.

1. Guaranteed representation on management boards constructed for specific purposes.
2. A guaranteed number of seats in legislatures or on municipal councils.
3. The establishment of separate governmental bodies.[186]

All these mechanisms recognize the plural nature of Canadian society. The third is most closely related to the idea of inherent rights since it emphasizes the separateness of aboriginal societies. However the first two also recognize aboriginal peoples collectively.

The UFA makes provision for the first and third of these means of representation. Yukon Indians are guaranteed participation on territorial and regional boards including: the Surface Rights Board, the Yukon Land Use Planning Council, the Yukon Development Assessment Board, the Yukon Heritage Resources Board, the Water Board and, the Fish and Wildlife Management Board.[187] The proportion of Yukon Indian representation varies depending on the board in question. The Fish and Wildlife Management Board, the Yukon Heritage Resources Board and the Surface Rights Board, for example, provide for one-half Yukon Indian membership. For the Yukon Land Use Planning Council, the Water Board and the Regional Land Use Planning Commissions the proportion is one-third, while the Yukon Council on the Economy and the Environment, and the Yukon Energy Corporation allow for one-quarter Yukon Indian membership.

Chapter 24 of the UFA allows for the establishment of YFN governments. These governments will gain their legal standing from enabling legislation, not the *Indian Act.*

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[186] Whittington p. 82. It is also possible for band councils to enhance their powers through the *Indian Act*, though there are various reasons why First Nations avoid this route.

[187] Geddes and Cottingham list 26 such Committees, Commissions, Working Groups, Corporations, Panels, Boards and Councils. See Geddes and Cottingham pp. 101-103.

Accordingly the range of powers which they will be able to exercise will be greater than that provided for band councils under the *Indian Act*. In addition the actions of these governments, unlike band councils, will not be subject to the approval of the Minister of Indian Affairs. YFN governments will not only be able to enact laws and regulations, and develop and administer programs, but will also appoint members to the above mentioned boards, form corporations and legal entities, borrow money, draw up contracts and levy taxes.[188] The specific jurisdictions subject to negotiation number 16 including: a YFN constitution; relations with Canada, the Yukon and local governments; economic development; culture and aboriginal languages; education and training; health services; and civil and family matters. There is also a subsection which allows for the negotiation of "all matters ancillary to the foregoing, or as may be otherwise agreed."[189]

From the perspective of inherent aboriginal rights one of the more contentious aspects of this chapter is the section dealing with the development of YFN constitutions. To require legislative action on behalf of the Government of Canada in order that YFN constitutions receive legal standing seems contrary to the idea of aboriginal rights as inherent rights. It is, however, in keeping with the idea that YFN governments are being incorporated into the legislative regime of the Canadian state.

As for the application of the *Charter of Rights and Freedoms* there is nothing in the UFA which explicitly states that these constitutions would be subject to the *Charter*. However in August 1995 the Government of Canada restated its position that "[s]elf-government agreements...have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments."[190]

The UFA and Inherent Rights.

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[188] UFA, section 24.1.2, p. 259.

[189] UFA, section 24.2.0, p. 260.

[190] Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, p. 4.

In Chapter Two I outlined the inherent rights argument. There I indicated that inherent aboriginal rights are characterized as Creator-given rights. Historical priority establishes a strong tie between aboriginal peoples and the land and also serves as the basis for aboriginal claims to title to the land. This title is the source of a right of self-determination which itself is the source of a comprehensive list of specific rights. When specific inherent aboriginal rights are mentioned it is usually only the right to land and self-determination, as these are seen as fundamental to all other rights, such as harvesting rights. Most importantly these rights, because they are based on original occupation, are not dependent on Anglo-Canadian legal concepts for their validity. These rights carry with them responsibilities, essentially to preserve the land for future generations. Inherent aboriginal rights are both individual and collective rights, however individual rights are derived from membership in the collective. Therefore the only means of modifying those rights is by the consent of the collective. Inherent rights can also be said to accord to aboriginal peoples special rights and status within nation-states.

The question is, do the provisions of the UFA reflect the rights of YFNs as inherent rights as an historical fact, as a matter of principle, and in practice ? A close examination of the UFA indicates that establishing the connection between an inherent rights approach and the provisions of the agreement is difficult.

An inherent rights perspective does not denote that a certain quantity of land be retained by an aboriginal nation. Practically speaking, however, a smaller land base would be less likely to provide for the degree of self-sufficiency that aboriginal peoples seek. In this regard the UFA provides for twice as much land as did the AIP.[191]

However it is innately difficult to determine how much land is enough land. The question over land quantum was eventually solved when federal negotiators secured a mandate to negotiate guaranteed YFN involvement in land use planning, development, and assessment processes. What this illustrated was that YFNs did not have to own land outright in order to exercise some measure of control over it.[192] In addition YFNs retain traditional harvesting rights on unoccupied Crown lands.[193]

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[191] The AIP allotted 8,000 square miles of land to YFNs. (Whittington, p. 83)

More to the point is the manner in which aboriginal peoples will control settlement land. In order to satisfy an inherent rights criterion agreements should affirm the existence of aboriginal title on lands retained by aboriginal peoples and recognize that the Crown is acquiring title from them on non-settlement lands.

In terms of land tenure negotiators on all sides indicated that the UFA allowed that aboriginal title would be retained on all Category A and Category B settlement land to the same extent that YFNs own that land. The CYI has advised Yukon Indians that

> Yukon Indian people will keep aboriginal title to Settlement Lands. But aboriginal title will be surrendered on all Non-Settlement Lands.[194]

This seems to affirm the existence of aboriginal title on lands retained by YFNs.

In addition the UFA provides for the exercise of a number of other rights which are not available to other Canadians. The continuing right of access to Crown Land, for example, acknowledges traditional use by YFNs. The ability of YFNs to alienate their land and title may contradict the notion of an inherent right as espoused by Bill Wilson but at least the process of alienation involves the consent of the YFN.

The interpretation of land tenure offered by the negotiators and outlined in *Understanding the Yukon Umbrella Final Agreement* provides a useful shorthand way of comprehending the agreement. However it is worth noting that the UFA in fact avoids the explicit recognition of aboriginal title. Early in Chapter 5 (Tenure and Management of Settlement Land) we are advised that

> Nothing in this chapter constitutes an admission by Government that an aboriginal claim, right, title or interest can co-exist with the rights described in 5.4.1.1(a)

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[192] Interview with Tim Keopke, Associate Chief Negotiator, Government of Canada, July 27, 1993.

[193] Victor Mitander, September 1, 1993.

[194] Geddes and Cottingham p. 18

> [Category A Settlement Land] and 5.4.1.2 [Category B Settlement Land], or with a treaty.[195]

It is worth noting, however, that nothing in the UFA indicates that aboriginal rights or title have been extinguished.

This apparent contradiction is explained in *Understanding The Yukon Umbrella Final Agreement*. Here the CYI acknowledges that aboriginal title is not currently recognized in Canadian law, although "Indian people are continuing to work towards a definition of "aboriginal title and rights" in the political arena."[196] Hence YFN lands are referred to, in the UFA, as being held in "Equivalent to Fee Simple." What this means is that YFNs

> land rights are at least as broad and strong as other Canadians'. In the future, they may be broader and stronger when aboriginal title is defined.[197]

According to Victor Mitander not only has aboriginal title been retained on settlement lands it has only been withdrawn, not extinguished, on Crown lands. This title could be reinvoked if agreements are breached by government.[198]

This is an interesting perspective on the nature of aboriginal title in the wake of the UFA. However nothing I heard from government negotiators, or read in any policy statement, leads me to believe that the Government of Canada or the Government of the Yukon share this perspective. Any attempt to reinvoke aboriginal title would likely end up in court. In my view Canadian courts would most likely rely strictly on the letter of the UFA in interpreting the tenure provisions.

What we are left with then is not an affirmation of aboriginal title, at least not yet, but rather a new way of conceiving of land tenure, one which is unique to YFNs. While this affirms the special status of YFNs it does not necessarily constitute a recognition of aboriginal rights as inherent rights.

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[195] UFA, section 5.2.2, p. 43.

[196] Geddes and Cottingham, p. 18.

[197] Geddes and Cottingham, p. 18.

[198] Victor Mitander, September 1, 1993.

With regard to self-government an inherent rights perspective would be affirmed by the existence and authority of aboriginal governments being based entirely on a negotiated settlement and not federal, provincial or territorial legislation. Furthermore it should be acknowledged that the agreement is meant to articulate a right which has its origin outside Anglo-Canadian law. The self-government provisions should provide for a substantial range of jurisdictions, especially those most crucial to the identity of the community such as the delineation of the rights and responsibilities of the members of the aboriginal nation and the criteria for membership itself.

Each YFN will negotiate its own self-government agreement. The powers to be exercised are not delegated to it by the Government of Canada or the Government of the Yukon but were determined by negotiation. The range of jurisdictions available is substantial and includes those related to the development of a constitution and the determination of citizenship, two factors closely related to the question of collective identity. However these agreements will be put into force by enabling legislation to be passed by Parliament and the Yukon Legislative Assembly, after being ratified by the YFN in question. The legal basis of the right of self-government, then, is Canadian law.

One might argue that the requirement of federal legislation does not, in and of itself, deny a nation-to-nation relationship. All agreements in the Yukon have to be approved by the federal cabinet, the body which has the power to make treaties. Furthermore the Government of Canada often needs to put legislation before Parliament in order to implement treaties, such as the Free Trade Agreement with the United States.[199]

However two factors indicate that this is not an international treaty. The first is the involvement of the Goverment of the Yukon as a signatory to the agreement. A second factor is that while the UFA and subsequent final and self-government agreements will define the relationship between YFN governments and the Canadian state, Yukon Indians will still have legal and political relationships with the Canadian state beyond what is contained in those agreements. In this way the Yukon agreements will confirm the existence of YFN governments as a third order of government within the Canadian federation.[200]

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[199] Rand Dyck, *Canadian Politics: Critical Approaches*. Nelson Canada. Scarborough. 1993. p. 404 and p. 414.

At first glance it is difficult to see how financial provisions could be interpreted as making any comment on the nature of aboriginal rights. Compensation provisions could affirm the inherent nature of aboriginal rights should they acknowledge that aboriginal peoples suffered economic losses due to the infringement of their historic rights. Compensation should also be extended to duly constituted aboriginal governments, not individuals. These governments should be responsible for distributing these resources within their communities.

One could argue that the fact that compensation is being paid signifies a recognition that YFNs had interests which were violated by Canadian governments and hence they have a right to be compensated for their losses. There are two problems with this interpretation. First, the Canadian government doesn't recognize the violation of historic rights and interests as the reason for compensation. In fact the UFA provides no explanation for compensation despite the amount of money involved. Second, the requirement of compensation is found in British common law. Furthermore the bulk of the economic provisions (the tax buy-out, resource royalty sharing, economic development measures) seem designed to put Yukon Indians on an equal footing with other Yukoners.

This obviously has its benefits with regard to improving the economic and social conditions of Yukon Indians. However in and by themselves they dilute the uniqueness of YFNs by attempting to integrate them into the Yukon's economic mainstream. Two points may be made about this. First, Yukon Indians desire integration into the economic mainstream while maintaining their access to traditional economic pursuits.[201] The economic development provisions of the UFA are designed to ensure that they will be in a position to do so on their own terms.[202] Second, YFN governments will have a greater range of tools to assume the responsibility of ensuring the uniqueness of YFNs.

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[200] YFN governments are not a third order of government in a constitutional sense because federal government policy has been that self-government agreements are not protected by Section 35 of the *Constitution Act, 1982*. However the Government of Canada supports the constitutional protection of aboriginal governments. See Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, p. 8 and p. 10.

Conclusion.

From both a procedural and substantive perspective the UFA shows some evidence of actions and provisions which could be argued to constitute a recognition of YFN rights as inherent rights. The problem is that the process and content also show evidence which would refute such an assertion. Furthermore certain provisions of the agreement are worded in such a way as to amenable to either interpretation.

While the UFA does articulate some "objectives" it deliberately avoids providing a rationale or philosophical basis for the negotiations. The UFA does not recognize aboriginal rights as inherent rights as a matter of principle. In fact the UFA states that

> Nothing in a Settlement Agreement shall be construed as an admission by Government that Yukon First Nations or Yukon Indian People have any aboriginal rights, title or interests anywhere within the sovereignty or jurisdiction of Canada.[203]

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[201] Recently six YFNs - the Champagne-Aishihik First Nations, the Kluane First Nation, the Teslin Tlingit Council, the Little Salmon-Carmacks First Nation, the Selkirk First Nation, and the Tr'on dek Hwech'in First Nation - purchased the Yukon Inn, a hotel in Whitehorse. See Chuck Tobin "Yukon Inn was bought for $4 million", *Whitehorse Star*, June 4, 1996, p. 5. The Tr'on dek Hwech'in First Nation and the Little Salmon-Carmacks First Nation have also signed agreements for joint ventures with mining companies. See "Deal encourages native mine deals", *Yukon News*, June 19, 1996, p. 11.

[202] Paul Birckel, August 31, 1993.

[203] UFA, section 2.6.4, p. 18.

When DIAND minister Ron Irwin introduced the enabling legislation for YFN self-government agreements in the House of Commons he reiterated that "[t]hese agreements...make no reference to the inherent right of self-government."[204]

Yet for the Government of Canada to "not admit" that aboriginal rights, title or interests exist; or to "make no reference" to the inherent right of self-government is not a denial of any of those concepts. Neither does any of this language constitute extinguishment of any aboriginal right, title or interest. As a matter of fact Irwin left open the possibility of recognizing the inherent right of self-government at some point in the future. This would be impossible if the right were extinguished.

This silence on the inherent nature of YFN rights and title, as an historical fact and as a matter of principle, should not come as a surprise. The UFA is a highly complex legal document which is meant to reflect a political agreement. Statements regarding history and principle are more likely, and perhaps more properly, found in policy statements and speeches by politicians. As a matter of fact DIAND minister Tom Siddon stated at the UFA signing ceremony that the agreements constituted "modern day treaties that acknowledge that Indians occupied this part of Canada long before European settlers arrived."[205]

As a matter of practice the fact that such an agreement was *negotiated*, and the substance of the agreement which was negotiated, confirms the separate, collective identity of YFNs. In this sense YFNs are not entirely *apart from* Yukon and Canadian society but neither are they *a part of* that society in the sense that they have been assimilated into it. In the following two chapters I will examine the role that rights arguments, and other factors, played in this outcome.

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[204] Ron Irwin, House of Commons Debates, Volume 133, Number 076, 1st session, 35th Parliament, Wednesday, June 1, 1994, p. 4716.

[205] Chuck Tobin, "200-plus attend historic land claim signing", *Whitehorse Star*, May 31, 1993, p. 1.

Chapter Four

The Effect of Rights Discourse on the Outcome of the UFA Negotiations

In his study of federal-provincial negotiations Richard Simeon wrote that

> Much of this process takes place outside public view and goes unreported in the press. Therefore a great deal of the data used must come from those most knowledgeable about it: the participants.[206]

The negotiations which began in the Yukon in 1973 are different than those that Simeon wrote about a year earlier. While Simeon's work addressed the making of policy the negotiations in the Yukon were an application of federal policy, shifting though it was. These two sets of negotiations do share one important characteristic, however. Most of the data for studying these processes must come from those who participated in them. This is especially true when attempting to discern the role that rights discourse played in the outcome of the UFA negotiations.

Tim McTiernan, Chief Negotiator for the Government of the Yukon, said that rights arguments "inform", but do not "drive" the negotiations process.[207] This observation succinctly explains the effect that rights discourse had on the negotiation of the UFA. The effect, therefore, that rights discourse had on the outcome of the negotiations was indirect because the purpose of negotiations was to reach an agreement that was "practical, workable, and acceptable"[208] not to achieve philosophical harmony.

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[206] Richard Simeon, *Federal-Provincial Diplomacy: The making of recent policy in Canada*. University of Toronto Press. Toronto. 1972. p. xi.

[207] Interview with Tim McTiernan, Chief Negotiator, Government of the Yukon, July 19, 1993.

[208] Tim McTiernan, July 19, 1993.

The purpose of this chapter is to explain what it means for rights arguments to inform but not drive a negotiations process. This will reveal the nature of this indirect effect.

In order to do so this chapter will explore how rights discourse influenced the positions which each party brought to the negotiating table, and how rights arguments affected the way in which those positions were advanced at the negotiating table.

One must keep in mind that negotiators are not political philosophers. Hence, they do not employ the kinds of analytical distinctions between types of rights, that were made in Chapter Two. It is usually clear when negotiators are referring to legal rights. But, as was the case in Chapter Two, some use the term inherent rights when referring to non-legal aboriginal rights, others do not.

Regardless, this exploration will reveal that though the context in which negotiations took place was affected by rights discourse, particularly legal rights discourse, the parties did not focus on resolving philosophical or legal disagreements. Instead they tried to set aside such disagreements and concentrate on constructing an agreement that satisfied, to the greatest extent possible, the interests of each of the parties, without explicitly negating the rights views of any of the parties. So while the legal and political context of negotiations was greatly influenced by rights discourse, the process, and outcome, of negotiations were influenced more by practical considerations.

That rights discourse had an indirect effect is not a result peculiar to negotiations in the Yukon. The chapter will conclude with an assessment of the problems involved in attempting to employ abstract arguments in any claims negotiations. This discussion will also indicate why the employment of abstract arguments is difficult in any political negotiation.

Avoiding theoretical arguments.

In resolving YFN claims the parties had two options. The first option was to pursue matters through the courts. This approach was rejected by all parties as lengthy, expensive and ultimately inadequate. The federal government's view was that courts can only go so far in dealing with the issues surrounding aboriginal claims. Courts can confirm that rights exist but putting those rights into practice is "a matter to be negotiated between the parties acting in a conscious and responsible matter."[209] This led to the second option which was to

> set aside the question of who's right and who's wrong, guide [the negotiations] by the case law, and the things which are undisputed, and try and craft an agreement which builds on that background and yet addresses the reality of today.[210]

For all parties the undisputed aspects centred around the federal government's obligations to YFNs. It was clear that the *Royal Proclamation of 1763*, the *Order in Council Transferring Rupert's Land and the North-Western Territories to Canada* (1870), the *Yukon Act*, the *Constitution Act, 1982*, and Supreme Court of Canada decisions, give rise to certain obligations regarding unsurrendered lands in the Yukon. YFNs never ceded or surrendered their lands and "ordinary legislation hasn't legislated away their aboriginal right and their aboriginal title."[211]

According to Tim Keopke the fact that the parties are negotiating agreements "is a very clear acknowledgement on the part of [the Government of Canada] that there is a right out there and there's an obligation on government." In his view the federal government

> is very supportive of the rights as they have been confirmed to date. We don't argue about those.[212]

Still, from the federal government's perspective there was much about aboriginal rights that was unclear. This lack of clarity had to do with the application of the accumulated legal foundation to the provisions of a complex comprehensive claims agreement. The question was not the existence of obligations but the extent and priority of those obligations and the rights which emanated from them.[213]

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[209] Tim Keopke, July 27, 1993.

[210] Tim Keopke, April 10, 1994.

[211] Tim Keopke, July 27, 1993.

[212] Tim Keopke, April 10, 1994.

The federal government's approach, however, was not to resolve the legal and philosophical issues raised by these rights and obligations. This approach was taken for two reasons. First, it was felt that the philosophical debates could not be resolved, at least not in a manner clear or expeditious enough to benefit negotiators. Second, it was believed that even if such questions could be resolved pragmatic, and not philosophical, concerns were the proper focus of the negotiations.

The territorial government agreed that the focus of negotiations "should be on trying to resolve the problem, not trying to decide whether somebody has a specific right or not." The parties agreed that they were not trying a court case so they did not want to hear each other's interpretations of each other's rights and which rights had, or had not, been extinguished.[214]

Though the federal government tried to adopt a non-position on philosophical issues, its approach can be characterized as a contingent, legal rights approach. Though aboriginal rights could not be strictly defined, the parameters surrounding the understanding of aboriginal rights was to be constructed from Canadian legal and political concepts.

The Legal Basis of the CYI Claim.

Every negotiator interviewed mentioned the need to focus on legal issues when crafting agreements. Many indicated an outstanding legal obligation - specified in varying degrees - as the basis of the CYI claim. Whatever its other merits the UFA had to be legally solid.

This was not merely a matter of government policy. The wide range of interests that would be affected by the UFA (and any agreement made pursuant to its provisions) made this necessary. The UFA would have to be able to sustain whatever challenges might be put against it.

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[213] Tim Keopke, July 27, 1993.

[214] Barry Stuart, April 11, 1994.

Using self-government as an example, Tim McTiernan illustrates the extent to which Canadian legal and political practice determines the context in which negotiations take place. According to McTiernan "[t]here are two sets of issues one has to deal with in the development of a negotiation position and in the advancement of interests at the negotiation table." The first set of issues concerns what is "legally possible under current constitutional arrangements", that is, the division of powers between the federal government and the provincial governments. The second is "what's available for reference in other [self-government] agreements and in other legislation [i.e. the *Indian Act*]."[215]

Another area that a province or territory can not ignore is federal policy. This provides the framework for negotiations and sets the limits to which provinces and territories can go in reaching agreements. Provinces and territories do have some flexibility in that aboriginal governments' areas of jurisdiction will be provincial/territorial, and municipal. There is little federal jurisdiction involved in self-government arrangements. Where federal jurisdiction is involved - the administration of justice, the sharing of tax points - the authority is delegated to the aboriginal government from the federal government.[216]

Once the constitutional, legal, and federal policy, parameters are understood reaching an agreement "boils down to a broad policy issue of... government's stance with respect to self-government, and self-government arrangements." These arrangements

> can run the gamut from...First Nations...hav[ing] delegated authority for managing their own affairs under the laws of general application, to the recognition of self-government arrangements under separate statute or separate agreement.[217]

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[215] Tim McTiernan, July 27, 1993.

[216] Tim McTiernan, July 27, 1993.

[217] Tim McTiernan, July 27, 1993.

At that point the task becomes negotiating those areas of jurisdiction and authority which will be included in self-government agreements and how that jurisdiction and authority will be co-ordinated with that of established governments.[218]

The focus on legal documents and the legal integrity of the agreements was shared by the CYI. It was not interested in an agreement that would not be upheld by Canadian courts. Dave Keenan "take[s] the position strongly" that the position adopted by YFNs is "a legal position. The Royal Proclamation defines it - thou shalt settle with the Natives." The legal necessity of settlement confirms that the land is owned by YFNs. For Keenan, ownership affirms that YFNs are "sovereign First Nation[s]" with inherent rights to their "traditional territory."[219]

Given the legal nature of the challenge before them, and their desire to protect their rights in Canadian law, YFNs had to adopt legal tactics in negotiating the UFA. YFNs "not only talked about rights [they] hired some of the top lawyers" in Canada in order to get their opinions of aboriginal rights. The use of respected legal scholars and practitioners was necessary so that the CYI's arguments would not be dismissed by government or the courts. These lawyers confirmed for the CYI that the evolving view of aboriginal rights was that these rights had a solid legal foundation.[220]

However Keenan's statement reiterates a point made in Chapter Two. For Yukon Indians, as with aboriginal peoples elsewhere in Canada, inherent aboriginal rights have both legal and non-legal (moral, cultural, historical) characteristics. If the concept of aboriginal rights were fully captured by Canadian law their argument would be strictly a contingent, legal rights argument. That was not the case.

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[218] Tim McTiernan, July 27, 1993. The exercise of self-government jurisdiction is not an either/or proposition. According to the model self-government agreement a YFN may assume only certain aspects of an area of jurisdiction if it wishes. This partial jurisdiction must be co-ordinated with existing jurisdictional regimes.

[219] Dave Keenan, August 5, 1993.

[220] Paul Birckel, August 31, 1993.

Keenan said that the legal rights of YFNs were bound up with "moral obligations to ourselves and our people and our future generations." That was the thinking that motivated the creation of *Together Today for Our Children Tomorrow.*[221]

There was also a spiritual/cultural dimension to YFN thinking. When YFNs put their negotiating positions together they spoke in terms of a right of sovereignty because

> The Great Spirit and others said that we do have the right. My elders tell me that. It's ingrained in our culture. We've got the right.[222]

Once again the function of Canadian legal documents is in recognizing pre-existing aboriginal rights, and not in creating them.

Victor Mitander pointed to the historical dimension. His ancestors "had rights" when they were the only inhabitants of their traditional territory. "Then, all of a sudden, they had these new rules, new rights imposed on them." They had no say in how this was done. YFNs found themselves in their own country, on their own land, with someone else's government running their lives.[223]

In addition to the need for legally solid agreements government's emphasis on legal rights was also motivated by the need to generate public acceptance for the results of the UFA negotiations. Barry Stuart believes that "a large segment of the population...wouldn't support a land claim if there wasn't a legal basis to it." For these people moral arguments are not persuasive. Only the existence of a legal obligation justifies claims negotiations. The legal obligation is compelling because

> [T]hey are proud of living in a democracy, they believe in the rights of the minority and the rights that the Charter protects and they believe that if you make a commitment, a legal commitment to somebody at some time, you have to honour that.[224]

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[221] Dave Keenan, August 5, 1993.

[222] Dave Keenan, August 5, 1993.

[223] Victor Mitander, September 1, 1993.

[224] Barry Stuart, August 17, 1993.

There was also, on the government side, recognition of a relationship between the legal and moral dimensions of the rights issue. Stuart characterized this relationship as one where "[t]he legal issue formed the basis for why governments had to [negotiate agreements], the moral issue really...put substance to [them]."[225]

There is also "a large segment of the population that without the legal obligation would still feel that there's a moral obligation." In Stuart's view people who are aware of the history of aboriginal, non-aboriginal relations "feel a moral obligation." Many do not know, or care, what the law says.[226]

Stuart acknowledges that there are others who take a position that is not founded in rights, legal or moral. These people want a social contract which allows people to live in harmony with one another and are less concerned about the basis of that contract.[227] Mitander's view of negotiations shows a certain element of the social contract approach. He believes that

> [t]here's no reason why we can't work together and work out an arrangement on how things should be done - in Yukon, by Yukon people, according to Yukon rules.[228]

However this can only be done by respecting YFN rights and with the consent of YFNs, not by having the federal government impose an arrangement.[229]

Tim Keopke offered the opinion that certain legal requirements indicate an underlying moral position. He mentioned the duty of the Government of Canada to uphold the honour of the Crown in its dealings with aboriginal peoples as an example. Upholding the honour of the Crown is tied to the federal government's fiduciary obligation to aboriginal peoples and is a matter of honesty and fairness, which are moral concepts before they are legal ones. In *Guerin* the Supreme Court of Canada gave a scathing judgement regarding the government's exercise of its fiduciary obligation and the prejudicial effect this had on the honour of the Crown.[230]

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[225] Barry Stuart, April 11, 1994.

[226] Barry Stuart, August 17, 1993.

[227] Barry Stuart, August 17, 1993.

[228] Victor Mitander, September 1, 1993.

[229] Victor Mitander, September 1, 1993.

The negotiating policy of the Yukon Government, under the NDP, grew out of a basic conviction that even if there was a lack of legal definition, or an absence of legal precedents, the status quo could not continue. Historical injustices had been committed and therefore had to be corrected.[231] As a result Yukon Government negotiators were well aware of the moral issues involved in resolving YFN claims.[232]

Putting Rights Arguments Aside.

Negotiating the UFA on the basis of rights would have been difficult because of the complex nature of the rights being claimed, and by the fact that there was no consensus on the nature of those rights. The rights environment was informed and, to an extent, bounded by Canadian law. However this environment was also influenced by strong moral rights, and inherent rights, concepts.

Rather than fight about the precise nature of the rights at issue the parties decided to negotiate agreements that accommodated their various interests.[233] They were "driven by the need to...cohabit the territory on some kind of agreeable terms."[234] This gave rights secondary importance and made devising a regime that people could live with the focus of the negotiations.

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[230] Tim Keopke, April 10, 1994.

[231] Shakir Alwarid, Co-ordinator, Kwanlin Dun First Nation, July 30, 1993. Alwarid was Deputy Minister of the Yukon Government's Land Claims Secretariat and its chief negotiator in 1992.

[232] Barry Stuart, April 11, 1994.

[233] Tim Keopke, July 27, 1993.

[234] Tony Penikett, Government Leader, Government of the Yukon, 1985-1992, July 28, 1993.

> What we're talking about is whether you consider [rights] or whether you focus on them and I'm saying you have to consider them somewhere along the line but you don't specifically focus on them, otherwise you'll get absolutely nowhere.[235]

Tim McTiernan pointed out that the recognition of rights is more a political step than a part of the negotiations. "If you don't have the political recognition [of aboriginal rights] you don't have the negotiation mandate to deal with it."[236]

Keopke noted that even if Canada recognized aboriginal rights as inherent rights "you have to find ways to make it work."[237] This is a challenge because "[t]here's no clear cut formula, it's more intuitive at best." The parties have to consider the legal context but must also have a

> practical sense [of] what's going to work for the rest of the folks that have to live here. There's no point in pitting Indians against non-Indians...over a single point called legal rights, because if they can't get along when it's over legal rights aren't going to do them any good any way.[238]

The Objective of Negotiations.

In negotiating the UFA the parties agreed on the following objectives:

> 1. to provide a settlement that recognizes the value of native culture and allows Yukon Indians to preserve and promote that culture;
>
> 2. to negotiate a fair and equitable settlement for Yukon Indian land claims that will benefit both native and non-native residents;
>
> 3. to respect the rights of third parties in reaching a settlement.[239]

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[235] Tim Keopke, July 27, 1993.

[236] Tim McTiernan, April 7, 1994.

[237] Tim Keopke, April 10, 1994. It is worth noting that the Government of Canada's policy on the inherent right of self-government (August 1995) focuses on the implementation of that right, not the definition of it.

[238] Tim Keopke, April 10, 1994.

[239] Legal Basis for the Yukon Land Claim. LCS file LC88-860, p. 1.

From the federal government's perspective this meant reaching agreements whereby YFNs could have land, were able to occupy it, manage it, regulate it to some extent, and derive an income from it. Then the task would be to find a simple, fair, and cost-effective way of implementing the agreements.[240]

The Government of the Yukon took a similar approach. Recognizing aboriginal rights meant allow[ing] for them in the UFA and enabling them through legislation. But once rights are recognized, and objectives reached, questions focus on how legislative powers will be distributed, how services will be paid for, and how governments will work together. Actual program transfers will depend on the practicalities and needs in each community.[241]

The interests of YFN communities range from constitutional issues to local problems of drug dependence, alcoholism, student drop out rates, family violence, and the lack of training opportunities.

> And the claim has no meaning in a community...if [it] can't address those real issues...And all the rhetoric about aboriginal rights and their inherency or whatever are nothing if you can't begin to go from what's in an agreement to some real community solutions.[242]

The YFN view of negotiations is also squarely rooted in practical considerations. Dave Keenan's words echo those of McTiernan. To him "self-government means dealing with community wellness starting with the individual, going to the family, going to the community to make people work together [based] on their cultural values." He doesn't "know how...you can say that at the Prime Ministerial level, at the Cabinet level, at the Parliamentary level because...there's nothing about that in the federal government's comprehensive claims policy or the self-government policy." Ultimately these issues can't be dealt with on an academic or policy level. They have "to be dealt with at the level of human issues."[243] Negotiating agreements brings the issues to the human level by bringing legislative authority to the community level.

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[240] Tim Keopke, July 27, 1993.

[241] Shakir Alwarid, July 30, 1993.

[242] Tim McTiernan, April 7, 1994.

From this perspective even the demands for the constitutional protection of self-government agreements, and the recognition of an inherent right to self-government, are based on practical considerations. The utility of constitutional protection and recognition is that they will prevent the federal government from unilaterally altering those self-government agreements.[244]

On the other hand the fact that constitutional protection and recognition were not achieved did not serve as a barrier to concluding agreements: "If we ...wait[ed] for the constitutional protection...[w]e wouldn't be anywhere."[245] Once again a pragmatic approach was in evidence.

Paul Birckel emphasized the utility of agreements in terms of generating economic opportunities for YFNs, opportunities denied them by the dominant society. These agreements also allow for the use of traditional knowledge in areas such as wildlife management and land use planning.[246]

Rights Arguments at the Negotiating Table.

One might think that the negotiations process would proceed in a linear manner: one begins by articulating the underlying principles, a negotiations process is then agreed to, and the end result develops logically from that. However those involved with the UFA negotiations process say that's not how it worked. From the beginning the parties focused on goals, the underlying principles and the process developed and changed as negotiations went along.

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[243] Dave Keenan, August 5, 1993.

[244] Dave Keenan, August 5, 1993.

[245] Dave Keenan, August 5, 1993.

[246] Paul Birckel, August 31, 1993.

According to YFN negotiators rights arguments "mattered very much."[247] Quite a bit of the time was spent at the negotiating table talking about rights.[248] But what is most interesting is the way in which rights were discussed. As Tim Keopke put it

> [e]very topic opens favouring the highly theoretical end...As time goes on in any given topic it comes from the quite theoretical level - legalistic, philosophical, historical - down to the practical: How the hell do we make it work in the community ? [249]

As a result negotiations eventually become "a discussion of intergovernmental relations, relations between communities, a matter of pragmatics, and the adaptation of existing processes to suit a new reality."[250] Issues like wildlife management were eventually driven by some internal logic - such as the conservation of resources - not rights.[251] As Yukon Government negotiator Karyn Armour put it: "It's real nuts and bolts stuff."[252]

Tony Penikett recalled that "[o]ften you'd begin negotiations with First Nations giving a very principled speech about some concept like sovereignty." He said that if you were listening with your eyes closed you would think that YFNs were arguing for their own armed forces, although their real concern might have been controlling the appointment of the principal of the local school. It was as if negotiations had to begin by articulating belief systems before the parties could begin negotiating "practical arrangements."[253]

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[247] Dave Keenan, August 5, 1993.

[248] Victor Mitander, September 1, 1993.

[249] Tim Keopke, April 10, 1994.

[250] Tim McTiernan, April 7, 1994.

[251] Tim Keopke, April 10, 1994.

[252] Karyn Armour, Associate Chief Negotiator, Government of the Yukon, August 10, 1993.

[253] Tony Penikett, July 28, 1993.

Barry Stuart believes that "it was necessary for the aboriginal people at the table to stress the legal basis of their argument. They had to as the background for what they were claiming." The demands could not simply be based on a desire for land, money, and political rights. They had to be based on claims of aboriginal rights and inherent rights.[254]

YFNs had to make their case in negotiations because "[i]t's not a case that anybody else had eloquently put to the public." Non-aboriginal people are not educated to accept aboriginal claims and those who are elected to public office, or hired to negotiate agreements, are not necessarily more informed on the issue. It was important to ensure that the people at the table were starting from the same set of information and perceptions of the outstanding legal and social obligations.[255]

In negotiations YFNs "talk[ed] about their history on the land, their traditional use of the land, [and] their traditional way of decision-making." This discourse "sets the context for...all the negotiators." While the claim had to be acceptable to all Yukoners "ultimately it [had] to be a fair resolution of the outstanding claims for First Nations people."[256]

Certain issues dwell more on the abstract than others but it's hard to predict which issues will. Overall the use of rights arguments is "more contextual...than specific to the provisions of agreements." In order to illustrate this point McTiernan cited three issues where the CYI used rights arguments.

The first issue is self-government. After 1987 the right of self-government, especially as an inherent right, was discussed substantially, especially with regard to constitutional recognition.

> In the broadest sense of a right, the right to self-government has been [at the] core of discussions, but core in the sense of being a thematic issue that has sometimes involved detailed discussions about how one might define the right and how one

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[254] Barry Stuart, April 11, 1994.

[255] Barry Stuart, April 11, 1994.

[256] Karyn Armour, August 10, 1993.

> might constitutionally protect the right, but a back drop in many ways to the discussion of the specific elements of self-government agreements.[257]

As mentioned above YFNs claim ownership of the land by virtue of their original occupation of it. YFNs also stressed that they "were self-governing before the government came along" and wanted to get back to that position. Their right of self-government, therefore, was not presented as a new right but was "something [they] had in the past" and brought forward. Fully articulating these rights meant looking back in order to understand what they were doing before government starting regulating their lives.[258]

Among other things YFNs wanted to continue traditional harvesting practices, and have the right to do so recognized in the UFA. Their self-government agreements would have to allow them to do this on their own terms, not those of government. YFNs were most successful in translating their rights into practice in those provisions, such as those regarding renewable resources, where they had a strong idea of what they wanted. This not only provided for strong agreements but also for ones that people were comfortable with.[259]

Harvesting is the second issue McTiernan pointed to and was one where rights were discussed explicitly and specifically. The context for this discussion was greatly influenced by legal decisions, especially *Sparrow*, that define and articulate criteria for identifying and prioritizing rights.[260]

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[257] Tim McTiernan, April 7, 1994.

[258] Paul Birckel, August 31, 1993.

[259] Paul Birckel, August 31, 1993.

[260] Tim McTiernan, April 7, 1994. The commercial aspect of aboriginal rights was dealt with by the Supreme Court of Canada in a decision handed down in August 1996. In this case (Van der Peet) the court ruled that the right of aboriginal peoples to fish commercially is not a constitutionally protected right. The court allowed that a commercial fishing right could exist and set out a criteria for identifying an aboriginal right. This will be discussed in greater detail in Chapter Six.

The negotiators did get into questions such as "what was an aboriginal right to hunt, what did it mean ?" To YFNs it was "the exclusive right to hunt up to the level of what their need was."[261] Dealing with need illustrates how discussions quickly move from matters of principle to more pragmatic considerations.

In asserting their harvesting rights YFNs always began with a claim for a certain number, or percentage, of a particular resource. As chief negotiator Stuart would respond that whatever the aboriginal "right might be it's really important to have a balance...We don't want to have a contest to see who's going to shoot the last moose in the Yukon." The problem was defining aboriginal need and then allocating the resource beyond that needs level.[262]

Government negotiators always tried to put the non-aboriginal interest into the allocation formula. They saw this as a way of safeguarding the resource. YFNs could not afford to manage all the resources of the territory on their own. Conservation efforts, therefore, would require "a collective management regime." However, if YFNs had an exclusive right to wildlife resources there would not be any government money put into conservation because there would be no public support for such a policy. The end result would be a conservation versus development conflict split along aboriginal, non-aboriginal lines.[263]

Getting the CYI to agree to a co-operative management regime was not difficult. YFNs favoured co-operative management because it was in keeping with their traditional values.[264] In fact the demand for a co-operative management regime was a long-standing grievance of YFNs and was contained in *Together Today for Our Children Tomorrow.*[265]

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[261] Barry Stuart, April 11, 1994.

[262] Barry Stuart, April 11, 1994.

[263] Barry Stuart, April 11, 1994.

[264] Dave Keenan, August 5, 1993.

[265] CYI, *Together Today for Our Children Tomorrow.* Charters Publishing Company Limited. Brampton, Ontario. 1977. p. 34.

A third issue where rights arguments manifested themselves was with regard to title for retained land and how title would be defined for YFNs. The compromise that was reached was illustrated in Chapter Three. YFNs are acknowledged to retain aboriginal title to settlement land although in the UFA this title is referred to as "equivalent to fee simple." In addition YFNs continue to have access to, and harvesting rights on, Crown land. The way in which this compromise was reached will be examined in Chapter Five.

Barry Stuart identified two types of situations where rights issues arose from time to time. The first type of situation occurred when somebody new to the negotiations had to be brought up to speed as to the basis of aboriginal claims. Usually the use of certain phrases: "we'll *give* you so much land", or "we'll *let* you hunt a certain number of animals" would bring forth an assertion of rights. Rights issues also arose when dealing with the details. Even though agreements might eventually be driven by pragmatic considerations it's important for YFNs to use decisions like *Sparrow* to indicate the priority and scope of aboriginal harvesting rights when co-operative management regimes are being negotiated.[266]

Because the context in which negotiations took place was so heavily influenced by legal factors, lawyers played an important role in the negotiations process. This, in turn, raised the profile of legal rights issues in the negotiations. In McTiernan's view

> [i]f you were to take the lawyers out of the process, with all due respect to lawyers, there'd be very, very limited discussion of [legal] rights...and a lot of intercultural, intercommunity transaction about living together side by side, and living together in two cultures."[267]

This, in McTiernan's view, is what the agreements are really all about.

The above discussion of the purpose of negotiations, and the role that rights arguments played in those negotiations shows a great deal of similarity in the approaches used by YFNs, the Government of Canada, and the Government of the Yukon.

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[266] Barry Stuart, April 11, 1994.

[267] Tim McTiernan, April 7, 1994.

However while all parties focused the negotiations on practicalities there was a subtle but profound difference in their approaches. For government negotiators the recognition of rights and the exercise of those rights may not have been entirely separate issues, but there does not seem to have been a necessary connection between the two. YFNs were recognized as having rights but the nature of those rights was regarded as unclear and therefore not a guide to negotiations. Ultimately what YFNs had, in the government view, was a right to negotiate an agreement.[268]

Yet from the YFN perspective issues which may have seemed entirely pragmatic, such as land use planning, were seen as intimately related to aboriginal rights. This is especially true where the discussion revolved around decision-making processes: who could participate, at what stage of the process, and in what manner. From the YFN perspective the exercise of rights is, in fact, a necessary extension of the recognition of those rights: it is the ability to exercise rights that gives their recognition meaning.

Theoretical Arguments and Claims Negotiations.

The above evidence illustrates that rights arguments had an indirect effect on the outcome of the UFA negotiations largely because the purpose of the negotiations was to craft a "practical, workable and acceptable" agreement. Hence the emphasis was on pragmatic, rather than theoretical, considerations.

However Tim McTiernan offered another reason why theoretical issues are not "addressed directly in the negotiation process."[269] Here the focus is on the nature of theoretical arguments.

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[268] To reiterate a point made above, the recent federal policy regarding the inherent right of self-government deliberately separates the question of the definition of the right from its implementation.

[269] Tim McTiernan, July 27, 1993.

According to McTiernan theoretical arguments speak to people in "formal operational terms."[270] That is, they are very general and abstract. In his view these types of arguments "inform the political intelligentsia...in bureaucracies [more] than...elected representatives." In this way theoretical arguments help "frame the advice that's offered to politicians, in terms of policy options and policy decisions." This is particularly true with regard to legal arguments.[271]

Formal operational arguments are "not easy to communicate...to the public at large." The general public thinks in "concrete operational terms" about political issues, especially those they are not familiar with. Concrete images of the confrontation at Kanawake and Kanesatake, the plight of the Innu of Davis Inlet, and suicide rates on Indian reserves, inform public sentiment more than discussions of the significance of the *Royal Proclamation of 1763*. As a result the way in which policy advice "is picked up on and the way in which options are decided upon" by politicians "is informed very much" by the public reaction to events.[272]

McTiernan believes that the formal operational arguments for aboriginal rights and self-government have informed the constitutional negotiations on those issues much more than they have informed the negotiation of actual self-government agreements.

> What's been done in negotiation of self-government agreements is informed much more by the *realpolitik* of what's workable in the region in which the agreements are being negotiated.[273]

He points to the Charlottetown Accord as "a perfect example" of an exercise in formal operational thinking.[274] The Accord was an "intricate net of abstract ideas balanced and offset against one another" and made "absolutely perfect sense" to those involved. However no one could effectively communicate the formal operational ideas of the Accord to the public. Many of those involved in the negotiations "were disillusioned and disappointed when it was rejected."[275]

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[270] The terms "formal operational" and "concrete operational" are borrowed from Jean Piaget, the Swiss psychologist. McTiernan has a Ph.D. in social psychology.

[271] Tim McTiernan, July 27, 1993.

[272] Tim McTiernan, July 27, 1993.

[273] Tim McTiernan, July 27, 1993.

[274] McTiernan was involved in the Charlottetown Accord negotiations as a representative of the Yukon. He was Deputy Minister of the Executive Council Office at

Because of the pragmatic focus of claims negotiations the discussion tends to function in concrete operational terms. As a result rights theories

> penetrate the [negotiating] process not very deeply, [and] not very often. But it's like scattered rays of the sun: sometimes they'll come in with a blinding flash and then they'll leave again. And we live in a more shadowy, less illuminated world.[276]

Despite whatever illumination they may provide McTiernan would not wish to negotiate under the glare of abstract arguments. He considers it "a perverse form of revisionism" to negotiate agreements based on contemporary interpretations of actions taken decades or centuries ago. In his view a discussion of aboriginal title, based on rights positions, would not get anywhere. It would simply bandy back and forth between one side's assertion that title was extinguished and the other side's assertion that it was not. None of this is helpful in crafting a land tenure regime for YFNs in their present circumstances.[277]

McTiernan concedes that he is "offering a very governmental perspective" on whether negotiators "can go from first principles based on historical documents to a workable arrangement for today." He appreciates that Yukon Indians might emphasize rights arguments differently, or more strongly, than he or other government people would

> because they have lived under the framework of legislation all their lives in a way in which you and I never have...I don't think we have any understanding of what it's like to be a person living under the direct application of legal provisions on your day to day life in the way that First Nations people have lived under the framework of the *Indian Act*. And in many ways, I think, a lot of the discussion

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the time.

[275] Tim McTiernan, July 27, 1993.

[276] Tim McTiernan, April 7, 1994.

[277] Tim McTiernan, April 7, 1994.

> in abstract on rights and on constitutional processes and on the legal basis of the claim is as much an historical consequence of having your life shaped in a tremendously strong way by a piece of legislation, as it is on a morally abstract or principally abstract sense of what a right is and what a right isn't.[278]

Conclusion.

The purpose of this chapter was to explain what it means for rights arguments to inform but not drive the UFA negotiations process. This involved an exploration of the effect rights arguments had on the positions the parties took to the negotiating table and how rights arguments affected the way in which those positions were advanced at the negotiating table.

Rights discourse informed the negotiations process in that it helped determine the context in which negotiations took place. This is particularly true of the legal rights discourse. Negotiators had to be mindful of the provisions for aboriginal rights in Canadian legal documents and court decisions.

It would not be accurate to suggest, however, that non-legal rights arguments were ignored. From the YFN perspective rights arguments based on spiritual, cultural, moral, and historical considerations were also important. Combined with legal rights arguments, these helped form the position which YFNs brought to the negotiating table. Political leaders and negotiators for the Government of Canada and the Government of the Yukon were aware of the importance of these considerations. Their negotiating positions and strategies were also, to an extent, based on moral considerations.

The influence of rights arguments was limited, however, by three sets of factors. The first set of factors is that negotiations focus on issues which are pragmatic and whose solutions are highly technical. The UFA is, among other things, a complex legal document. Its function is not to simply identify or articulate rights but to provide a framework (together with final agreements, self-government agreements, and implementation plans) for the solution of day to day problems.

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[278] Tim McTiernan, April 7, 1994.

So while rights arguments were important in getting government to accept the legitimacy of aboriginal claims, they had less relevance when the parties sat down to work out the finer points of issues like land use planning. It was these pragmatic issues which drove the negotiations process. As a result philosophical harmony, to the extent that it existed, was sacrificed because none of the parties placed a paramount interest in sustaining it.

The second set of factors has to do with the nature of rights arguments. These arguments are highly abstract. To the extent that they affect the way people think about aboriginal claims they are more likely to affect the thinking of civil servants than that of politicians or the general public. As a result rights arguments have more of an effect on the advice that politicians consider when formulating a negotiating position, than they do on the actual conduct of negotiations.

The third set of factors that limited the effect of rights arguments is related to the pragmatic nature of negotiations. Aboriginal claims negotiations do not take place in a vacuum. There are many events and factors, other than rights discourse, that can influence the outcome of negotiations. Five of these factors - the negotiating position of the CYI, events at the national level which influenced federal policy, the changing position of the territorial government, the effect of the principled negotiations process, and the imbalance of political power between the parties - will be examined in Chapter Five.

Before I move on to that discussion there is one final point which should be made regarding the role of rights discourse in the negotiations process. This point relates to the statement made at the beginning of this thesis, that political action is based on ideas.

It is, of course, the case that the purpose of negotiations is to create agreements. Yet what is practical and workable will to some extent be determined by what is acceptable. And what is acceptable will to an extent be determined by how well agreements reflect the values that people hold. These values include perceptions of rights and the proper nature of relationships between individuals, communities, and states.

The general public is influenced by concrete images. However members of the general public, aboriginal and non-aboriginal, also have ideas about abstract concepts such as aboriginal rights. As a result negotiators have to consider both praxis and symbolism in dealing with the general public.

For example, negotiators must heed the public's views with regard to what aboriginal governments must look like in practice. However, the public is not of one mind on the subject. Any agreement must represent a compromise position among the views advanced at the negotiating table. Negotiators and political leaders must be willing, and able, to convince the public that the consensus which has emerged from the negotiating table should be acceptable to the society at large.

And though it is difficult to quantify the indirect effect that rights discourse had on the outcome of the UFA it is fair to say, and there was a general if vague consensus on the point from interviewees, that negotiations would not have taken place in the manner that they did if the rights discourse did not exist, or if rights arguments had not been advanced by YFNs.

Chapter Five

Non-Rights Factors and the UFA Negotiations

In Chapter Four it was concluded that the effect of legal, moral and inherent rights discourse on the outcome of the UFA negotiations was indirect. Indirect in the sense that rights discourse helped establish the context in which negotiations took place, and that rights discourse helped frame the policy advice which civil servants gave to political leaders.

This indirect effect was due to two factors. The first factor is that the parties agreed to focus on practical, rather than philosophical, issues in negotiating the agreement. The second is that the views which the general public, and therefore political leaders, have of aboriginal claims are shaped by concrete images of events as well as abstract arguments about rights.

Rights discourse was not, however, the only - or perhaps even the most important - factor in shaping the environment in which negotiations took place. The purpose of this chapter is to explore five factors, besides rights discourse, that affected the outcome of the UFA negotiations and the impact that inherent rights discourse had on the outcome. These factors are: the negotiating position taken by the CYI; events at the national level which affected the claims policy of the Government of Canada; changes in the policy of the Yukon Government after the election of the territorial NDP; the principled negotiations process; and the relative political power of the three parties.

The Position of the CYI.

Throughout the negotiations the public statements of the CYI emphasized the need to recognize and protect aboriginal rights. These rights were generally identified as rights to land and rights associated with land ownership (title, and hunting, fishing, trapping, and mineral rights). The rights agenda also included a demand for self-government and the ability to deliver education, health, social services, and other government services. The need for financial compensation for the infringement of aboriginal rights was also in the forefront of the demands, although payment in exchange for rights or land was generally frowned upon. The self-government debate (negotiating the establishment of YFN governments with a broad range of powers outside the *Indian Act*) evolved later in the process. What was mentioned less often was the basis of aboriginal rights claims.

The perspective offered in *Together Today For Our Children Tomorrow* falls largely within the realm of inherent rights, though the term *inherent rights* is not used. There is a strong historical emphasis. The historical priority of Yukon Indian settlement and the differentiated rights due YFNs as a result are seen as fundamental. The document speaks of a "special place under the present Constitution of Canada."[279] Furthermore there is an emphasis on the collective rights of YFNs, especially the right to establish self-governing institutions at the local level.

Yet three specific passages indicate that at this time YFNs did not articulate their claims in a manner which would characterize their rights as fully inherent. At times the rationale seems contingent on certain conditions applying and accepts the legitimacy of Canadian political institutions. At one point the document reads:

> Until Social and Economic equality is achieved, the Yukon Indian People insist upon their right to be dealt with as a special group of people.[280]

This suggests that once social and economic equality were achieved special status would no longer be necessary. However I do not think that Yukon Indians intended that special status was to be a temporary measure. In fact the settlement they desired would institutionalize their special status. Later on the following statement is made:

> The Yukon Native Brotherhood on behalf of all the Indians of the Yukon Territory hereby declares that this Settlement is complete and final, and wipes out any and

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[279] CYI, *Together Today For Our Children Tomorrow*. p. 25.

[280] CYI, *Together Today for Our Children Tomorrow*, p. 24.

> all claims which are based upon native right, title, use of occupancy to land in the Yukon Territory against the governments of Great Britain, Canada, and Yukon, and all other persons.[281]

The current claims of Yukon Indians, and aboriginal peoples elsewhere in Canada, are not for a settlement which is complete and final or wipes out claims based upon "native right, title [or] occupancy." They are looking for more flexible arrangements, based on a recognition of inherent aboriginal rights, which will affirm their rights and status and allow their rights to grow and adapt to future situations. YFNs "want some uncertainty because they don't want to forego the possibility that a hundred years from now some enlightened Supreme Court of Canada" will enlarge the definition of aboriginal rights.[282] In short, complete and final settlement is a desire of Canadian governments, not aboriginal peoples.

A third example has to do with the ownership of land and the status of YFN governments. In *Together Today for our Children Tomorrow* the YNB proposed that

> the land selected by the Indian people will be held by the Queen in perpetuity for the use of both present and future generations...After the land is selected and set aside for the Indian people, a municipality will be set up under the Yukon Territorial Municipal Ordinance.[283]

Such a position is at odds with the idea of inherent rights. An inherent rights approach asserts that the land must be held outright by aboriginal peoples. Ownership, and the basis of aboriginal government, must be the historic occupation and unsurrendered rights of aboriginal peoples, not the authority of the Crown or a territorial ordinance. This is the position which was taken in negotiating the UFA. This position is augmented by the claim that YFN governments be considered equal in status and jurisdiction with the territorial government. In fact plans are in place to position the Council of Yukon First Nations (the successor organization to the CYI) as a territorial government for YFNs at least in some areas of jurisdiction.[284]

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[281] CYI, *Together Today for Our Children Tomorrow*, p. 25.

[282] Barry Stuart, August 17, 1993.

[283] CYI, *Together Today for Our Children Tomorrow*, p. 30.

Dave Keenan cautions against reading too much into the differences between the words used in 1973 and those which were incorporated into the UFA. In his view there was not any great change in YFN thinking.

> Things will evolve and you will look for the easiest, most efficient way to deliver anything whether it's terminology or a program...The intent was always the same. What has changed ...is the vehicle to do it.[285]

The CYI adopted the discourse of inherent rights as that discourse became more prevalent, starting in the mid-1970s. In May 1976 the CYI responded to criticism by National Indian Brotherhood[286] president George Manuel by stating that aboriginal rights came about when the first European reached North America and found people there. They have nothing to do with laws passed by government. Furthermore "[t]here is only one aboriginal right, and that includes the land, the water, the food."[287]

Then, on November 22, 1976, in an address to the territorial council in committee of the whole, CYI chairman Daniel Johnson stated that "the source of our right is our original occupation of this land and not...any Act of Parliament or Treaty as these were created because of the right and did not in fact create the right."[288]

At the CYI annual assembly in July 1984 a resolution was adopted which

> argued that aboriginal rights should be recognized and affirmed, not extinguished; that an agreement should recognize the right to aboriginal self-government; that the amount of settlement land should be determined by need, not by an artificial formula based on historic treaties; that the right to a subsistence livelihood should

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[284] See Karan Smith, "First nations plan new government", *Whitehorse Star*, August 7, 1996, p. 2.

[285] Dave Keenan, August 5, 1993.

[286] The NIB was the forerunner of the AFN.

[287] *Yukon Indian News*, May 1976, pp. 3-4.

[288] CYI, *Presentation of the Council for Yukon Indians to the Yukon Territorial Government Committee of the Whole*. November 22, 1976. p. 3.

> be protected; and finally that an agreement must not be final, but must be open to change in the future.[289]

These statements, in focusing on "original occupation" and the independent nature of aboriginal rights, show a strong element of an inherent rights approach.

Then, in September 1986, the CYI and the Government of the Yukon issued a joint position paper which stated that one of the key components of a Yukon agreement would be the "[a]ffirmation of aboriginal rights...there is no legal necessity to extinguish these rights or to clear title before a final land claim settlement." Furthermore "provision must be made for development of Native institutions and structures for self-government."[290]

But no matter how much the approach taken by Yukon Indians showed evidence of an inherent rights perspective it never spawned radical political demands.[291] *Together Today for our Children Tomorrow*, unlike the *Dene Declaration* which was issued two years later, was less a manifesto than a carefully considered negotiating position. The CYI's position always emphasized the need to consider all the implications and details of comprehensive claims negotiations and implementation. Many of these details (land, compensation, political rights, economic development initiatives, environmental and social impacts) were articulated in this document. Its strength can be seen in the fact that many of the demands made (such as areas of jurisdiction for YFN governments) were included in the UFA.

YFNs asserted their sovereignty within their traditional territories,[292] but this assertion never manifested itself in claims of independent nation-state status. Yukon Indians always maintained that their claims would be negotiated within the context of the

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[289] Pierce, p. 149.

[290] Council for Yukon Indians, Yukon Government Joint Position on Yukon Indian Land Claim Settlement (September 4, 1986), p. 2. LCS file LC87-580.

[291] Of course those who oppose YFN claims would view all these demands as radical.

[292] See comments by Dave Keenan in Chapter Four.

Canadian federation. The 1986 joint position paper emphasized that "there is no intention to go outside the bounds of Canada's Constitution."[293]

In negotiating the claim the internal process of the CYI emphasized participation at the community level. The goal was to secure a negotiating mandate which would be based on a consensus among Yukon Indians. This could only be achieved by getting people involved. This, in turn, was facilitated by the principled negotiations process.

The CYI's chief negotiator was aided by three regional negotiators who, collectively, coordinated the negotiations for the CYI caucus. The caucus, composed of the chiefs of the 14 YFNs, would provide direction to the negotiators although all positions had to be approved by the CYI's General Assembly.[294] Input was also received from community caucuses.[295]

One of the effects of involving people from the communities was a gradual shift of power over the course of the negotiations. When the claim was launched the CYI was the lead organization for YFNs. The development of the CYI as the one strong voice for Yukon Indians was necessary "so that people would sit up and listen and knew that [YFNs] had a case." As such the CYI played a key role not only in preparing for negotiations but also in educating all Yukoners, Indians and non-Indians, about the demands being made.[296] Eventually, as more people from the communities became more involved, more knowledgeable, more experienced, and more confident, power shifted to individual YFNs.

> The door was always open to anybody that wanted to come in, and observe and participate...I think by people participating, seeing how the process worked, they

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[293] Council for Yukon Indians, Yukon Government Joint Position on Yukon Indian Land Claim Settlement, p. 2.

[294] The General Assembly is composed of the chiefs, individual YFN council members, elders, and members at large.

[295] Victor Mitander, September 1, 1993.

[296] Paul Birckel, August 31, 1993.

> became more and more aware of the need to control, [and] provide direction and decisions from the community.[297]

The development of confidence and expertise at the local level was also necessitated by the fact that each YFN would negotiate its own settlement agreement and self-government agreement. As these agreements are concluded it will be up to individual YFNs to delegate powers to the CYI as a central organization, if they so choose.[298]

Victor Mitander said that a consensus approach can give negotiators a strong mandate to negotiate "[i]f you can get a full consensus." One obstacle is that it takes a lot of time to achieve a consensus among the people in the 14 YFNs.[299] While aboriginal claims are almost always discussed in terms of "aboriginal versus non-aboriginal", there are substantial differences between aboriginal nations. YFNs have different histories and cultures. They are also widely dispersed geographically.

Geography can give rise to different interests. These interests can reflect the relative remoteness of the community, the level of interaction with non-aboriginal people, and the resources which the YFN seeks to protect and have continuing access to. The Kwanlin Dun First Nation and its lands, for example, are in and around the City of Whitehorse. As the only "urban" YFN it has a unique set of interests in its settlement and self-government negotiations.

The nature of the agreements in the Yukon (each YFN negotiating its own settlement agreement and self-government agreement pursuant to the UFA) reduced the depth of consensus that was required. YFNs have many common interests - the need for land, self-government, compensation, participation in resource management boards - and these are the focus of the UFA. There is also considerable flexibility in the arrangements. As mentioned above the model self-government agreement allows for YFN governments to assume authority at their own pace.

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[297] Victor Mitander, September 1, 1993.

[298] Victor Mitander, September 1, 1993.

[299] Victor Mitander, September 1, 1993.

Achieving a consensus within each YFN is less problematic and, at any rate, the only way for YFNs to negotiate. In Dave Keenan's view a consensus, once achieved, provides negotiators with a very strong mandate since by its very nature a consensus decision will have a broad base of legitimacy within the community.[300]

It is also worth noting that although land claims and self-government agreements are complex documents the mandate that negotiators receive is not designed to address each specific clause. In the case of the Teslin Tlingit Council (TTC) elders were instrumental in determining the mandate. The Teslin Tlingit elders had a great deal of trust in the negotiators. This trust was justified because of the level of communication which existed among the negotiators, the elders and the rest of the community. The elders defined the TTC's goals but how negotiators reached those goals "was pure negotiation."[301]

The ability of YFNs to achieve and sustain a consensus is aided by demographic and geographic factors. It is easier to attain a consensus amongst a small, culturally homogeneous, and geographically concentrated population than it is amongst a large, pluralistic, and dispersed population. The relative solidity of the mandates of YFNs and the CYI contrasts with the more fluid positions of the territorial government and the federal government. This difference proved to be a source of conflict and frustration, as will be seen later.

In terms of content the approach taken by the CYI, like that of the federal and territorial governments, was a mix of principle and practicalities. The negotiators had to deal with issues such as self-government, the entrenchment of aboriginal rights, and resisting government attempts to extinguish aboriginal title.[302] However these issues had to be dealt with in a way which would deliver concrete benefits at the community level.

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[300] Dave Keenan, August 5, 1993.

[301] Dave Keenan, August 5, 1993.

[302] Victor Mitander, September 1, 1993.

As Paul Birckel put it, people see things very simply in terms of what their rights should be.[303]

One can see inherent rights discourse as an important factor in the negotiating position of the CYI. The CYI position emphasized the inherent nature of YFN rights as a matter of historical fact and in principle. However as a matter of practice these rights were to be exercised within the Canadian federation. The result is that the UFA affirms the special status of YFNs within Yukon society - the goal articulated in *Together Today for Our Children Tomorrow.*

Events at the National Level.

One must look beyond the Yukon to understand why the UFA recognizes aboriginal rights in the way that it does. Examining events at the national level reveals that the concept of aboriginal rights, the state of the inherent rights approach, and government willingness to accommodate these concepts are much different today than they were when negotiations began in the Yukon in 1973.

In 1969 the federal government issued a statement on Indian policy, commonly known as the "White Paper."[304] This policy proposal sought to eliminate the segregation of aboriginal peoples from the rest of Canadian society by eliminating their special legal status. The stated purpose for this initiative was to make them truly equal with other Canadians, as their differentiated legal status was seen as a barrier which prevented aboriginal people from gaining the full benefit of Canadian citizenship.[305] The rights to which aboriginal Canadians would be entitled would be "the fundamental rights...to full and equal participation in the cultural, social, economic and political life of Canada."[306]

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[303] Paul Birckel, August 31, 1993.

[304] DIAND, *Statement of the Government of Canada on Indian Policy 1969*. Queen's Printer. Ottawa. 1969.

[305] Boldt, *Surviving as Indians,* pp. 297-300.

[306] Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution*. Methuen Publications. Toronto. 1984. p. 8.

Under such a regime aboriginal governments would not be founded on any special right (inherent or otherwise) but would take on a delegated status, analogous to municipalities in the province (or territory) in which they existed.[307] In the words of Prime Minister Pierre Trudeau, aboriginal people "should become Canadians as all other Canadians."[308]

As a perspective on rights this view is squarely within the liberal-individualist strain, one which sees a *uniformity* of rights as a fundamental aspect of equality. These rights should, as much as possible, focus on individual, rather than collective liberty. The elimination of any type of special status for identifiable ethnic or national groups was also in keeping with Trudeau's views on nationalism. His negative view of Quebec nationalism is well documented.[309] It seems that in 1969 he considered Quebec nationalism and aboriginal claims to be similar phenomena which therefore had to be dealt with similarly.

The reaction of aboriginal people was uniformly negative. In 1970 the Indian Chiefs of Alberta issued a response called "Citizens Plus", also known as the "Red Paper." In it they said that as a means of dealing with aboriginal problems the federal position "offers despair instead of hope." They also characterized the elimination of their special legal status and the suggestion that aboriginal self-government should be delegated as "not so much an end to segregation but an end to liberty." The Chiefs feared that if their governments became merely "undifferentiated municipal governments" their special rights would disappear and their societies would become undifferentiated.[310] This, of course, was one of the purposes of the proposed policy.

While the negative reaction to the White Paper informed the federal government how aboriginal leaders felt about this particular policy proposal it took a decision by the

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[307] Clark, pp. 157-158 and p. 214.

[308] Asch, *Home and Native Land*, p. 63.

[309] See Pierre Elliot Trudeau, *Federalism and the French Canadians*. Macmillan of Canada. Toronto. 1968.

[310] Clark p. 158.

Supreme Court of Canada (SCC) to convince the federal government that its policy had to change. This decision also indicated the direction in which that policy had to move.

Calder v. Attorney-General of British Columbia involved the land claim of the Nishga[311] who live in the Nass Valley of BC. In this case the Nishga asked the court to decide whether their "right to use collectively and occupy the land for the purposes of hunting, fishing and trapping" had been extinguished by "the legislative acts of the colony of British Columbia and the crown colony of Vancouver Island...prior to Confederation."[312]

The case eventually found its way to the SCC and was heard by seven justices. Justice Pigeon refused to consider the question of aboriginal title and dismissed the Nishga appeal on technical grounds. He concluded that "an action of this nature could [not] be brought against the Province of British Columbia in the absence of legislation allowing suits against the Crown."[313] However the six other justices chose to address the question of aboriginal title.

The issue of aboriginal title is complicated by the fact that two forms of title - aboriginal title and Crown title - are asserted over the same land at the same time. In the Anglo-Canadian legal system Crown title is assumed to underlie aboriginal title, or any other form of title, on lands over which the Crown claims sovereignty. According to The Report of the Task Force to Review Comprehensive Claims Policy (the Coolican Report) the *Royal Proclamation of 1763* "clearly recognized that aboriginal peoples had legal and original possession of their lands and that the proper process of acquisition was the surrender of title by them and a purchase by the Crown."[314] What was at issue was the form of title being surrendered.

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[311] The name is now commonly spelled *Nisga'a*, however I will use the spelling used at the time, the spelling used by the Supreme Court in its decision.

[312] Asch, *Home and Native Land*, p. 47.

[313] Asch, *Home and Native Land*, p. 49.

In dealing with the issues of aboriginal rights and title Canadian courts have relied on two landmark cases from the United States, *Johnson v. M'Intosh* (1823) and *Worcester v. The State of Georgia* (1832). In deciding *Calder* the SCC once more turned to these precedents. The decisions in these cases

> stand for the principle that aboriginal title is a legally recognized right to occupy and possess those lands held by Indians. The decisions also establish that the legal title of the land went to the discovering state, subject to the aboriginal right of occupation and possession; that aboriginal title is further limited by the fact that alienation can be made solely to the state or Crown; and that aboriginal title can be extinguished only through either conquest or cession and purchase.[315]

The British Crown therefore never denied that aboriginal title existed, only that it was a subordinate form of title. As a form of title based on occupation and possession it therefore conferred only rights of occupation and possession. By asserting that "legal title of the land went to the discovering state" the court affirmed that Crown title, by contrast, conferred rights of sovereignty. The practical import of this is that aboriginal title, as a subordinate form of title, could be modified by the exercise of Crown sovereignty. It is this relationship between aboriginal title and Crown title that was recognized by the courts in 1973.

In *Calder* the six Supreme Court justices who addressed the issue of aboriginal title were unanimous in holding that the Nishga "had an aboriginal title to their lands at the time of contact with Europeans."[316] They were evenly divided, however, on the question which was at issue: "whether that aboriginal title still existed."[317] Justice Judson

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[314] Task Force to Review Comprehensive Claims Policy. *Living Treaties: Lasting Agreements*. Report of the Task Force To Review Comprehensive Claims Policy. (Murray Coolican, chairman). Indian Affairs and Northern Development. Ottawa. 1985. p. 7.

[315] *Living Treaties: Lasting Agreements*, pp. 7-8.

[316] Asch, *Home and Native Land*, p. 64.

[317] Asch, *Home and Native Land*, p. 64.

(with Martland and Ritchie concurring) argued that it did not. In Judson's view a series of proclamations and ordinances, issued between 1858 and 1870 by the Governor of the Colony of British Columbia and the Legislative Council of British Columbia, showed the intent, and had the effect, of extending sovereignty over all of BC.[318]

Justice Hall (with Spence and Laskin concurring) disagreed. Hall argued that "[p]ossession is of itself at common law proof of ownership" and that "[u]nchallenged possession is admitted here."[319] Furthermore "[o]nce aboriginal title is established, it is presumed to continue until the contrary is proven."[320] Therefore the Nishga "were entitled to assert, as a legal right, their Indian title."[321] This title could be extinguished by the Sovereign, however any legislation which purported to extinguish aboriginal title had to clearly and plainly indicate that intention. Finally, "the onus of proving that the Sovereign intended to extinguish the Indian title lies on [the Crown]...There is no such proof in [this] case...no legislation to that effect."[322]

Because the court split evenly on the continuing existence of aboriginal title Justice Pigeon's refusal to hear the case ended up being the deciding vote. Though the Nishga lost their case Justice Hall's findings with regard to aboriginal title caused Prime Minister Trudeau to concede that aboriginal peoples probably had more legal rights than his government realized when it formulated the 1969 White Paper.[323]

This led directly to "a reversal of state policy of the greatest magnitude."[324] Subsequently the Government of Canada rescinded its effort to eliminate the special legal status of aboriginal peoples and accepted comprehensive claims for negotiation, despite the fact that the decision in *Calder* did not legally require it to do so.[325] A second important development is that it is the argument put forward by Hall that has been supported by judicial opinion since 1973.[326]

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[318] *Calder v. Attorney-General of British Columbia*. Canada, Supreme Court Reports (1973) p. 331-334.

[319] *Calder v. Attorney-General of British Columbia*, p. 368.

[320] *Calder v. Attorney-General of British Columbia*, p. 401.

[321] *Calder v. Attorney-General of British Columbia*, p. 402.

[322] *Calder v. Attorney-General of British Columbia*, p. 404.

[323] Asch, *Home and Native Land*, p. 64.

[324] Asch, *Home and Native Land*, p. 8.

With the *Calder* decision and the rejection of the White Paper in mind the Government of Canada unveiled its first comprehensive claims policy on August 8, 1973. This policy was designed to deal with aboriginal claims in those areas of Canada (the Yukon, Northern Quebec, parts of the Northwest Territories, most of British Columbia) where treaties had never been signed. The federal government had comprehensive claims to negotiate as soon as its policy was articulated. The CYI claim was the first to be accepted for negotiations.

The Government of Canada's approach in this policy can be characterized as a contingent, legal rights approach. The government's goal was "to meet its lawful obligations to Indian people."[327] That concepts such as ***Indian Title***, ***Aboriginal Title***, and ***Usufructuary Rights*** were seen as by-products of Anglo-Canadian law, and not inherent rights, is evidenced by the statement that such claims

> arise among groups of Indian and Inuit people who never entered into treaty relationships with the Crown or whose title was never superseded by law.[328]

The reference to claims "never superseded by law" implies that the federal government did have the authority to supersede these rights without the consent of aboriginal peoples. This could only be the case if aboriginal rights were a part of, and not apart from, Canadian law.

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[325] Asch, *Home and Native Land*, p. 64.

[326] Asch, *Home and Native Land*, p. 51.

[327] Indian and Northern Affairs. *Annual Report 1973-1974*. Information Canada. Ottawa. 1974. p. 36.

[328] Indian and Northern Affairs, *Annual Report 1973-1974*, p. 34.

Two other important events which helped shape the next change in federal policy were The James Bay and Northern Quebec Agreement (1975) and the Mackenzie Valley Pipeline Inquiry (1974-1977).

In April 1971 the Government of Quebec announced its plans for a hydroelectric development in the James Bay region. In doing so "it followed its practice of neither involving the Cree in the decision nor examining the impacts of the development on them."[329] The actions of the Quebec government indicated to Cree leaders that "the government of Quebec believed that [the Cree] had no aboriginal rights and even if such rights did exist they were subordinate to the province's right to develop [Cree] traditional lands and territory, even without [the consent of the Cree]."[330]

The Cree "attempted to get discussions going with the provincial government and its crown corporations...However, the government refused to do anything but inform the Cree as the plans developed."[331] The Cree also attempted to get the Government of Canada involved but it was reluctant to do anything which might be construed "as a federal intervention in provincial affairs."[332] At this point, of course, the *Calder* decision had not yet been handed down. Hence the federal government was refusing, as per the White Paper, to recognize aboriginal rights.[333] Having been rebuffed politically the Cree took their claims to court.

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[329] Harvey A. Feit, "Hunting and the Quest for Power: The James Bay Cree and Whitemen in the Twentieth Century" in R. Bruce Morrison and C. Roderick Wilson (eds.). *Native Peoples: The Canadian Experience*. McClelland and Stewart. Toronto. 1986. pp. 194-195.

[330] Billy Diamond, "Aboriginal Rights: The James Bay Experience", in Boldt, Long and Little Bear, pp. 266-267.

[331] Feit p. 195.

[332] Feit p. 195.

[333] Diamond pp. 268-269.

In November 1972 the Cree and Inuit "initiated the longest temporary injunction in Canadian history."[334]

> Basically, the native people had to prove that they had a *prima facie* claim to rights in the territory, that the project would damage their exercise of these rights, and that these damages would be irreversible and unremediable. They asked the court for a temporary injunction stopping construction until permanent injunction hearings could be completed.[335]

As far as aboriginal title is concerned the Crown argued that "the Cree had no aboriginal title to the land, or at most had a right to some monetary compensation and small reserves such as were provided in other treaties made elsewhere in Canada."[336]

Justice Malouf handed down his decision on November 15, 1973. By this time he had the *Calder* decision to draw on. Though he discussed *Calder* he did not consider it decisive in this case.[337] It could be argued that he rendered the kind of decision that the Nishga desired. He ruled that because the Cree and Inuit had never signed a treaty the province of Quebec was trespassing on their land and had to negotiate an agreement in order to proceed with the project.[338] He therefore granted the Cree the temporary injunction they sought. The development continued, however, because a week later the Quebec Court of Appeal suspended the injunction.[339]

Eventually the Cree, the Inuit, the Government of Quebec, and the Government of Canada negotiated the James Bay and Northern Quebec Agreement. In it the Cree and Inuit surrendered "all [their] general claims, rights, titles, and interests in and to land in Quebec in return for specific and defined rights, privileges, and benefits which would be confirmed by federal and provincial legislation."[340] These specific and defined rights included the right "to hunt, fish, and trap all kinds of animals at all times, over all the lands traditionally harvested by [the Cree]..." Their harvesting rights would be subject to conservation measures but "would take precedence over sport hunting and fishing by non-natives."[341] The Cree also gained exclusive hunting and fishing rights over 17,000 square miles (44,027 square kilometres) of land. The agreement also established local government structures including a school board; a regional board of health and social services; a police force; some control over the administration of justice; financial compensation and corporations to manage the compensation.[342] Eight years after the fact Chief Billy Diamond wrote that the Cree were convinced "more than ever" that in negotiating an agreement they had made the right decision.[343]

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[334] Feit p. 195.

[335] Feit p. 195.

[336] Feit p. 197.

[337] Diamond pp. 270-272.

[338] Feit p. 197.

[339] Diamond p. 271.

Because the proceedings were settled out of court "there was no final pronouncement on the aboriginal rights of the Crees and the Inuit in the James Bay territory."[344] Despite this, and the fact that the injunction was overturned, "[t]he Crees consider... Mr. Justice Malouf's decision...[to be] one of the most significant judgments on aboriginal rights in modern times."[345] As with the *Calder* decision, this legal loss proved to have a silver lining. Aboriginal rights claims were legitimated by a Canadian court and Canadian governments was forced to take these claims seriously and negotiate a resolution.

Another judge, Thomas R. Berger, had a significant impact on aboriginal rights claims in the 1970s, though he was not acting in a judicial capacity at the time. As

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[340] Diamond p. 281.

[341] Feit p. 199.

[342] Diamond pp. 281-282.

[343] Diamond p. 280.

[344] Diamond p. 279.

[345] Diamond p. 271.

Commissioner of the Mackenzie Valley Pipeline Inquiry his report further legitimated aboriginal claims.[346]

In his report (the Berger Report) Commissioner Berger revealed the magnitude of the opposition to the pipeline. Opposition to the pipeline project was based on two concerns. First, that traditional ways of life would be destroyed by the influx into the North of persons and technology related to the construction and maintenance of the pipeline and ancillary projects. Second, that "northern development" invariably leaves few, if any, lasting benefits for those who make the north their home.[347] Berger therefore recommended (among other things) that the development of a pipeline be delayed for ten years so that land claims could be settled in the interim. He also recommended that aboriginal rights be recognized and protected, not extinguished.[348] Perhaps remarkably the former recommendation was accepted.[349] As for the latter recommendation that story is still unfolding. However it is worth noting that of the 10 comprehensive claims negotiated by the Government of Canada since 1975, four of them are in the area Berger studied.[350]

The lasting significance of the Berger Report is the legitimacy which was accorded to aboriginal rights claims. Not only were they seen to exist, which the federal government was willing to acknowledge to a limited extent, but they were seen as something which should continue to exist. This position was in opposition to the federal approach which saw the extinguishment of aboriginal rights as a necessary component of a settlement. Indeed by indicating the need to recognize title Berger made the settlement of aboriginal claims a prerequisite for development in the north. This placed aboriginal rights claims as the foundation of any social contract to be reached between aboriginal societies and the Canadian state.[351]

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[346] Thomas R. Berger. 1977. *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*. Douglas & McIntyre Ltd. Vancouver.

[347] Berger p. 62.

[348] Pierce pp. 90-91.

[349] This is not to suggest that Berger's arguments were decisive. The economics of the international gas markets at the time may have influenced the government's decision.

[350] These four agreements are: The Inuvialuit Final Agreement; The Gwich'in Agreement over the Mackenzie River delta; The Sahtu Dene and Metis Agreement; and the Vuntut Gwitchin Agreement in the Northern Yukon. (M. Smith, p. 11)

In the wake of these and other developments the Government of Canada issued a revised comprehensive claims policy in 1981. *In All Fairness: A Native Claims Policy* emphasized that the thrust of federal government policy was "to exchange undefined aboriginal land rights for concrete rights and benefits." Furthermore any agreement had to be final.[352]

Though this policy recognized that aboriginal Canadians could enjoy different rights than other Canadians (special status) the approach could still be described as a contingent legal rights approach. A discussion of the basis of aboriginal rights is avoided. Instead what is emphasized is the negotiation of settlements which would be recognized in Canadian law and be subject to that law. The term *aboriginal rights* would be fully domesticated in that it would only refer to rights contained in these agreements and would therefore be products of Canadian law. Inherent or undefined rights would disappear.

However even as it was being released the approach advocated by *In All Fairness* was being overtaken by larger events, namely the constitutional negotiations of the late 1970s and early 1980s. This latest round was spurred on by the election of the Parti Québécois in November 1976. By 1979 constitutional negotiations were in full swing. As part of the negotiations, and especially the desire to include a charter of rights and freedoms, aboriginal groups from across Canada campaigned to have their rights recognized and articulated in this document.

When the *Constitution Act, 1982* came into effect on April 17, 1982 there were several provisions which referred to aboriginal peoples. Section 35(2) of the Act recognized "the Indian, Inuit *and* Métis peoples" as aboriginal peoples.[353] Section 25 indicated that the *Canadian Charter of Rights and Freedoms* would not be interpreted "so as to abrogate or derogate from aboriginal, treaty or other rights or freedoms that pertain to aboriginal peoples of Canada."[354] Perhaps most importantly Section 35(1) recognized and affirmed "existing aboriginal and treaty rights."[355]

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[351] Victor Mitander, September 1, 1993.

[352] The Government of Canada, *In All Fairness: A Native Claims Policy*. Published under the authority of the Hon. John C. Munro, P.C., M.P., Minister of Indian Affairs and Northern Development. Ottawa. 1981. p. 19.

The problem was that it was not clear what rights were considered to exist. Neither was there any plan for implementing whatever rights were deemed to exist. With regard to self-government, for example

> the practical question of how Indian self-government could be structured, financed and linked to the federal government remained unanswered, and the ideological dilemma of self-government as a right, deriving from the sovereignty of the Indian people and not the sovereignty of the state persisted.[356]

The drafters of the constitution were aware of this and Section 37(1) was included to provide for a First Ministers' Conference (FMC) on aboriginal constitutional matters to be convened within a year of the proclamation of the Act. The purpose would be to define the rights entrenched in the *Constitution Act, 1982.*[357]

Among all this uncertainty aboriginal peoples did have some small measure of protection. Section 52(1) states that

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[353] Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System: Environment, Structure and Process* (fourth edition). McGraw-Hill Ryerson Limited. Toronto. 1987. p. 705. (emphasis added) Until this point the Government of Canada had refused to recognize the Métis as an aboriginal people.

[354] Van Loon and Whittington, p. 703.

[355] Van Loon and Whittington, p. 705

[356] Sally Weaver, "A Commentary on the Penner Report." *Canadian Public Policy - Analyze de Politiques*, X:2 (1984), pp. 216-217.

[357] Boldt, *Surviving As Indians*, p. 302.

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[358]

This ensured that the sections referring to aboriginal rights could not be unilaterally altered by the federal government.

The first FMC was convened in March 1983. It was here that the Government of Canada unveiled a new position on aboriginal rights. According to Asch one important insight provided by this policy statement was

> that contemporary aboriginal societies are acknowledged to be autonomous cultures that have the right to an ongoing existence within Canada, and that one specific attribute of that existence is the constitutional recognition of some kind of self-government.[359]

Despite asserting rights the political manifestos of aboriginal peoples have, historically, refrained from asserting a form of sovereignty that would call the existence of Canada into question. For example the *Dene Declaration* (1975) spoke of "independence and self-determination within the country of Canada."[360] Such was the case at the initial FMC. The Métis National Council, in its opening statement, talked of "the preservation and development of our aboriginal nationality within the Canadian federation."[361] Chief David Ahenakew of the Assembly of First Nations stated that the AFN was "committed to strengthening and building Canada - not to dismantling it."[362]

As was the case in the Yukon aboriginal leaders at the national level believed that preserving their cultures and preserving Canada were not mutually exclusive ventures. However in order for both goals to be accomplished aboriginal peoples required the establishment of a third order of responsible government - aboriginal governments. These governments would be part of the federal system. They would not have jurisdiction over all aspects of aboriginal peoples' lives, only those "that influence directly economic, linguistic, cultural, educational and other related matters."[363]

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[358] Van Loon and Whittington, p. 711.

[359] Asch, *Home and Native Land*, p. 55.

[360] Asch, *Home and Native Land*, p. 35.

[361] Asch, *Home and Native Land*, p. 34.

[362] Asch, *Home and Native Land*, p. 35.

One would think, then, that there would have been some basis for agreement. Aboriginal groups wanted self-governing institutions and the federal government was willing to accommodate them. The federal government stipulated that these governments would have to function within the Canadian federal system and aboriginal groups saw themselves as part of that system. However no agreement on defining "existing aboriginal and treaty rights" was achieved. The parties did agree, however, to keep discussing the issue and a constitutional amendment was produced establishing three more FMCs.[364]

The direction of the remaining FMCs was influenced by the report of the Special Committee on Indian Self-Government (the Penner Report), released in October 1983. As Sally Weaver points out the Penner Report addressed many of the same issues as the 1969 White Paper (the need for a new relationship between Indians and the Canadian state, the poor socio-economic conditions of Indians) yet arrived at such different conclusions that "if the 1969 White Paper is viewed as the initial 'thesis' of Indian-government relations in Canada, the 1983 *Penner Report* is the 'anti-thesis'."[365]

The Penner Report broke new ground for parliamentary committees in both process and content. Procedurally the special committee consulted with "many Indian leaders from the local to the national level...[bringing] order and coherence to a line of innovative thinking among them." The report also explicitly incorporated "the 'terminology' used by Indians to describe themselves."[366]

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[363] Asch, *Home and Native Land*, p. 35.

[364] Boldt, *Surviving As Indians*, p. 304.

[365] Weaver p. 217. It is worth noting that the special committee addressed itself to the issue of "Indian" government south of 60. At this point it was not considered that the report would apply to aboriginal claims in the territories, or to the Métis. The report's recommendations also seem more amenable to self-government for First Nations with a land base and not aboriginal people living in urban areas.

In terms of content the report recommended (among its 58 recommendations) that First Nations self-government be explicitly recognized and entrenched in the constitution. This recognition would be of a "pre-existing right of self-government." As a result First Nations governments would "form a distinct order of government."[367] The actual implementation of self-government at the local level would be determined through bilateral negotiations between First Nations and the federal government.[368]

The Government of Canada released its response to the Penner Report on March 5,1984. In it the federal government acknowledged that

> Indian communities were historically self-governing and that the gradual erosion of self-government over time has resulted in a situation which benefits neither Indian people nor Canadians in general.[369]

However the federal government's response was more circumspect with regard to what was to be done about the situation.

The Government of Canada accepted the recommendation that attempts to develop self-government through amendments to the *Indian Act* or the development of "Indian Band Government Legislation" be scrapped.[370] Generally the federal government favoured establishing First Nations government through General Framework Legislation, introducing new legislation in areas that directly affect First Nations[371], and instituting improvements under existing legislation. However the federal government's response was rather vague[372] citing the need to consult with First Nations and provincial governments, and fiscal realities.[373]

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[366] Weaver p. 217

[367] Paul Tennant, "Indian Self-Government: Progress or Stalemate ?", *Canadian Public Policy - Analyze de Politiques*, X:2 (1984), p. 213.

[368] Weaver p. 218.

[369] DIAND, *Response of the Government to the Report of the Special Committee on Indian Self-Government*. DIAND. Ottawa. 1984. p. 1.

[370] DIAND, *Response of the Government...*, p. 1

[371] This would include removing discriminatory sections of the *Indian Act*, something that was eventually done by Bill C-31 in 1985.

With regard to constitutional amendment the federal government was explicit. While acknowledging that the special committee's "recommendations on constitutional matters are appropriate for consideration" the government did not endorse the recommendation itself. The resolution of the question would be left to the multilateral constitutional process and the federal government refused to commit itself in advance.[374] The government seemed willing to acknowledge that there was a need for more local autonomy but "unwilling to acknowledge an aboriginal right to self-government or to seek permanent and fundamental change."[375]

Given these developments it is not surprising that discussion at the second FMC, beginning on March 8, 1984, focused on aboriginal self-government. The conference opened with a surprise when Prime Minister Trudeau "changed the federal position by endorsing constitutional entrenchment of an aboriginal 'right to self-governing institutions.'" This change meant that the federal policy now embodied "the main constitutional proposal and most of the legislative recommendations of the Penner (Report)."[376]

Despite the Prime Minister's move discussion polarized over the inherent rights view espoused by aboriginal groups and the contingent rights view adhered to by the federal government and the provincial governments. A federal proposal to establish aboriginal governments under federal and provincial legislation was rejected by aboriginal leaders and some provinces, though for different reasons.[377]

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[372] Sally Weaver described it as "so general and undefined that it is not realistic to think of it as an adequate government response." (Weaver p. 219)

[373] DIAND, *Response of the Government...*, pp. 3-7.

[374] DIAND, *Response of the Government...*, p. 2

[375] Tennant, "Indian Self-Government...", p. 214

[376] Tennant, "Indian Self-Government...", p. 214.

The third FMC on aboriginal issues was held in Ottawa in April 1985. This was Prime Minister Brian Mulroney's first opportunity to publicly address aboriginal issues in this forum. His opening statement outlined the position and priorities of his government. It was his hope that the two days of meetings would "affirm and demonstrate the government's commitment to the further identification, definition, and constitutional protection of the rights of the aboriginal peoples."[378] The answer to aboriginal problems he said, "lies in aboriginal peoples assuming more responsibility for their own affairs, setting their own priorities, determining their own programs."[379] The key to this change was "self-government for aboriginal peoples *within* the Canadian federation."[380]

Again the idea of "self-government for aboriginal peoples within the Canadian federation" as means of "aboriginal peoples assuming more responsibility for their own affairs" seems consistent with the position taken by national aboriginal organizations. Why then could no agreement be reached ?

Mulroney's perspective was consistent with previous government policy in that aboriginal rights were viewed as a product of Canadian law. Nowhere does he use the term *inherent rights*. By emphasizing negotiated settlements the concept of consent is adhered to, albeit in a forum which ensures the supremacy of the federal government. Furthermore the constitutional route is mentioned as a way of recognizing and enforcing aboriginal rights, albeit within the context of Canadian law.

While this statement seemed more favourable to the idea of self-government than the previous government's position, for the most part there was little change. Not only was the term *inherent rights* not used, there was no indication that the government's position on extinguishment, which was so important, would change. Later that year, however, there was some hope that it would.

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[377] Boldt, *Surviving As Indians*, p. 287-288.

[378] The Right Honourable Brian Mulroney, "Notes for an Opening Statement to the Conference of First Ministers on the Rights of Aboriginal Peoples" in Boldt, Long and Little Bear, p. 157.

[379] Mulroney p. 160.

[380] Mulroney p. 161, emphasis added.

In July 1985 the federal government commissioned a task force to review its comprehensive claims policy. The task force, chaired by Murray Coolican, issued its report, *Living Treaties: Lasting Agreements* (the Coolican Report), in December 1985. The importance of the issue of the extinguishment of aboriginal title was not lost on the authors of the Coolican Report. One problem was that although "the concept of aboriginal title has been the subject of considerable judicial commentary, its characteristics [had] yet to be defined clearly."[381] Regardless the report concluded that

> A claims policy that requires a surrender and extinguishment of all aboriginal rights can, and must, be abandoned. It can be abandoned because, as we have shown, there are other methods for clearing title to the land. It must be abandoned because, if it is not, there will be no possibility of achieving land claims agreements based on common objectives.[382]

It also recommended that alternatives to extinguishment be found, even suggesting some alternatives.[383]

Armed with the Coolican Report and the experience of the three FMCs, the federal government announced a new comprehensive claims policy in December 1986. Recognizing the resistance to the government's insistence on extinguishment this policy promised "new approaches to the cession and surrender of title and self-government."[384] The revised policy still emphasized the desire for "certainty and clarity of rights to ownership."[385] However it allowed that "alternatives to extinguishment may be considered provided that certainty in respect of lands and resources is established."[386] This statement opened the possibility that one major stumbling block could be overcome.

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[381] *Living Treaties, Lasting Agreements*, p. 7.

[382] *Living Treaties: Lasting Agreements*, p. 43.

[383] *Living Treaties: Lasting Agreements*, pp. 41-43.

[384] The Government of Canada. *Comprehensive Land Claims Policy*. Indian and Northern Affairs Canada. Ottawa. 1987. p. 7.

[385] Canada, *Comprehensive Land Claims Policy*, p. 9.

The AFN's reaction to the new comprehensive claims policy was totally negative. The policy was referred to as "a frightening document" which "ask[ed] aboriginal people to commit suicide." Specifically the provisions with regard to extinguishment were dismissed because the requirement of cession and surrender (even if it is partial) amounted to the same thing.[387]

The final FMC on aboriginal issues was held in March 1987. Perhaps because it was the fourth meeting without progress it proved to be particularly acrimonious. Tony Penikett described it as "a meeting of bodies, but not of minds."[388] The premiers of Newfoundland, Saskatchewan, Alberta, and BC insisted that the scope of aboriginal self-government be defined prior to the entrenchment of the right in the constitution.[389] One of their concerns was that an undefined right of self-government might eventually be defined by the courts. Even Joe Ghiz, the Premier of Prince Edward Island, ostensibly a supporter of entrenchment, preferred to attach a "sunset clause" to the right so that it could be rescinded if it "did not work out."[390]

Aboriginal leaders resisted definition before entrenchment. While the entrenchment of the right of self-government in the constitution had to be negotiated at the national level, the implementation of self-government would take place at the local level. National level aboriginal organizations insisted that it was at the local level that self-government would be defined.[391] The aboriginal leaders also rejected a last-minute compromise which, in their view, would have "expand[ed] the way in which provinces could interfere in our lives and force us under their thumbs."[392] No agreement was reached.

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[386] Canada, *Comprehensive Land Claims Policy*, p. 12.

[387] AFN, *Analysis of Canada's Comprehensive Claims Policy*. 1987. LCS file LC 87-651. p. 1.

[388] Paul Gessell and Chris Dafoe, "Tasting bitter failure", *Maclean's*, April 6, 1987, pp. 21-22.

[389] Anne Sankey, "FMC ends without amendment", *Native Press*, April 3, 1987, p. 3.

[390] Rocky Woodward, "Talks split on self-government", *Windspeaker*, March 27, 1987, p. 1.

The negative feelings produced by this failure were exacerbated when less than a month after the FMC the First Ministers unveiled the Meech Lake Accord. Generally aboriginal leaders did not object to the resolution of Quebec's demands. As Zebedee Nungak of the Inuit Committee on National Issues stated

> our people and our committee and our organization have absolutely no quarrel with the principle of Quebec being included or being a full partner in the Constitution of Canada. We know what it is to be outside looking in.[393]

The sticking point for them was the recognition of Quebec as a distinct society in the absence of such recognition for aboriginal peoples.[394] This point was particularly galling for aboriginal leaders in that some of the same premiers who rejected their demand for self-government as too vague (therefore unworkable) embraced the distinct society clause because it was vague (therefore flexible).

Despite its expressed sympathies the Special Joint Committee which held hearings on the Accord in 1987 did not recommend changes in order to accommodate aboriginal concerns. Aboriginal leaders were prominent in opposing the Accord and gained a measure of satisfaction when Manitoba NDP MLA Elijah Harper was able to play a prominent role in burying it.

The defeat of the Meech Lake Accord held two victories for aboriginal peoples. First, the proposed constitutional amendments were not ratified. Second, their prominence in opposing the Accord, and the arguments they made in support of their position, ensured that they would be directly involved in any further attempts to amend the constitution.

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[391] Sankey p. 3.

[392] George Erasmus, National Chief of the AFN, quoted in Laurent Roy, "Native leaders voice anger", *Windspeaker*, April 3, 1987, p. 4.

[393] The Special Joint Committee of the Senate and House of Commons, *The 1987 Constitutional Accord: The Report of the Special Joint Committee of the Senate and House of Commons*. (Hon. Arthur Tremblay, Senator and Chris Speyer, M.P., joint chairmen). Queen's Printer for Canada. Ottawa. 1987. p. 107.

[394] Tremblay and Speyer p. 108.

Such was the case when the federal government announced, in September 1991, that it was ready to try again. The federal proposals, *Shaping Canada's Future Together*, from the outset, included provisions for recognizing aboriginal rights in the constitution. These initial positions were unacceptable to aboriginal leaders but they did provide a basis for negotiation. When the Consensus Report on the Constitution (the Charlottetown Accord) was finally unveiled in August 1992 a whole section was dedicated to "First Peoples."

The focus of this section was "The Inherent Right of Self-Government." The Accord recommended that

> The Constitution...be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada. This right should be placed in a new section of the Constitution Act, 1982, Section 35.1(1).
>
> The recognition of the inherent right of self-government should be interpreted in light of the recognition of Aboriginal governments as one of the three orders of government in Canada.[395]

The provisions were expansive, covering many issues related to the negotiation and implementation of this right. Much of what was included was somewhat vague, however. Further negotiation would be required to give greater precision to the clauses.

From a philosophical perspective the provisions of the Accord did not entirely fulfil the requirements of inherent rights, in the sense explained in Chapter Two. The provisions do recognize these rights as collective and allow for aboriginal peoples to assemble "duly constituted legislative bodies" in order to "determine and control their development as peoples according to their own priorities and ensure the integrity of their societies."[396]

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[395] Canada. *Consensus Report On the Constitution: Final Text* (The Charlottetown Accord). Charlottetown. August 28, 1992. p. 14.

[396] Canada, *Consensus Report on the Constitution*, p. 14.

However the Accord was silent on some important aspects of the inherent rights approach, particularly those which refer to the origin of aboriginal rights. There is no reference to "the Creator" (though God is mentioned in the preamble of the *Charter of Rights and Freedoms*). There is no reference to the historical priority of aboriginal societies or of the connection between aboriginal peoples and the land. There is no recognition that aboriginal rights originated outside the Anglo-Canadian system and therefore do not owe their legitimacy to it. This is not merely a legal question. It speaks directly to the question of aboriginal status within the Canadian polity.

This is not to suggest that inherent aboriginal rights are incompatible with the Canadian Constitution. There's no reason why rights which originate in the political and legal system of one society could not be incorporated into another. The Quebec Civil Code could be viewed as an example of this. However it is not explicit that this is what the negotiators had in mind. Neither do we have any idea how courts would deal with this type of interpretation.

The significance of these provisions became moot when the Charlottetown Accord, and its provisions for the recognition of an inherent right to self-government, was rejected in a national referendum on October 26, 1992.

In amongst this constitutional wrangling the SCC handed down three important decisions regarding aboriginal rights. *Guerin v. The Queen* involved the leasing of lands belonging to the Musqueam Indian Band to the Shaughnessy Heights Golf Club of Vancouver. At issue was the fact that the Department of Indian Affairs had induced the band to sign the lease even though the terms "were well below market standards at the time." In addition the band did not receive a copy of the lease until 1970, 12 years after the agreement was made.[397]

The case raised the issues of "the nature of Aboriginal title and the question of the nature of the government's legal responsibility towards Aboriginal peoples."[398] In its unanimous decision the SCC declared that "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown." The interest created by this right "gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians."[399] The Court concluded that in this case "the Crown [had] breached its fiduciary duty."[400]

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[397] Kulchyski, p. 151.

[398] Kulchyski, p. 151.

In *R. v. Sioui* (1990) the issue "was the question of whether or not a document signed by General Murray in 1760 was a treaty within the meaning of...section 88 of the Indian Act." The SCC decided unanimously that the document was a treaty.[401]

This decision was important in several respects. According to Kulchyski the SCC's statement that Indian societies were regarded as nations by the Europeans at the time the treaty was signed "implies favouring recognition of an inherent right to Aboriginal self-government."[402] Kulchyski also interprets the decision as expanding the requirement of a clear and plain intent on the part of the Sovereign in extinguishing aboriginal rights. In his view the SCC now required "an explicit statement to that effect."[403] The decision also served "to strengthen the value of treaty rights"[404] by requiring that "treaties and statutes relating to Indians...be liberally construed and uncertainties resolved in favour of the Indians."[405]

The third case involved Reginald Sparrow, a member of the Musqueam band. In 1984 Sparrow was arrested for fishing "with a drift net that was longer than had been permitted by the band's food fishing licence." Sparrow's defense was that he was exercising an existing aboriginal right. The case made its way through the provincial court (where he was found guilty), the County Court (where the decision was upheld), the BC Court of Appeal (which rendered an ambiguous verdict), and finally to the SCC which handed down its decision on May 31, 1990.[406]

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[399] *Guerin v. The Queen*, p. 382.

[400] *Guerin v. The Queen*, p. 388.

[401] Kulchyski, p. 182

[402] Kulchyski, p. 182.

[403] Kulchyski p. 183.

[404] Kulchyski p. 183

[405] *R. v. Sioui*. Canada, Supreme Court Reports (1990), Volume 1, p. 1035.

The SCC's decision was to order a new trial. However in doing so the Court elaborated on the idea of "existing aboriginal rights", and re-emphasized the federal government's fiduciary obligation to aboriginal peoples. Significantly the Court decided that aboriginal rights could be regulated. Such regulation carried two *caveats*. First, regulating a right did not have the effect of extinguishing that right. Second, any interference with a constitutionally protected aboriginal right must satisfy certain criteria. The criteria laid out by the court were as follows:

> First, is the limitation unreasonable ? Second, does the regulation impose undue hardship ? Third, does the regulation deny to the holders of the right their preferred means of exercising that right ?[407]

The onus of proving interference lies with the aboriginal group which is challenging government action. If interference is proved "the analysis moves to the issue of justification."[408] This analysis focuses on two issues, whether there is a valid legislative objective involved in the government action and whether the government is upholding its fiduciary obligation to aboriginal peoples in attempting to reach this objective.[409]

Using this test the Court established "a general principle for the allocation of scarce resources where an Aboriginal right remains in effect."[410] This principle was that due to the constitutional nature of the protection offered to the Musqueam food fishing right "any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing." A lower priority was allocated to commercial fishing and sport fishing.[411]

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[406] Kulchyski, p. 212.

[407] *R. v. Sparrow*, p. 1112.

[408] *R. v. Sparrow*, p. 1113.

[409] *R. v. Sparrow*, p. 1113.

[410] Kulchyski, p. 213.

Events at the national level affected aboriginal rights in two ways. First, they further articulated the content of aboriginal rights. This was due largely to judicial decisions which affirmed the pre-existing nature of aboriginal rights and found a broader basis for them in Canadian law.

The second area of impact is in the greater legitimacy accorded aboriginal demands. While legal decisions and parliamentary reports played a role in this, the legitimacy of aboriginal demands was augmented by the status accorded the aboriginal leadership in constitutional discussions. The Berger, Penner, and Coolican reports were also instrumental in validating the claims being made.

There's no doubt that changes took place with regard to self-government, aboriginal title, and the entrenchment of aboriginal rights in the constitution. The only form of self-government which could have emerged out of the 1969 White Paper would have been a delegated, municipal form of government. By the early 1990s it was acknowledged that aboriginal governments would be negotiated between aboriginal communities and Canadian governments, and established under separate legislation. There is even wide acceptance of these governments as a third order of government and of the idea that the right of self-government be entrenched in the constitution as an inherent right.

In the late 1960s the concept of aboriginal title was written off as too vague to be of any practical value. Beginning with the *Calder* decision Canadian courts began to articulate the idea of aboriginal title. By 1987 "alternatives to extinguishment" were a part of federal policy.

Similar change to federal policy can be seen with regard to entrenching aboriginal rights in the constitution. In 1969 the idea was to eliminate differentiated rights. Aboriginal leaders were not invited to participate in the debate over the patriation of the constitution when it began in the late 1970s. By the time of the Charlottetown Accord, however, the leaders of Canada's national aboriginal organizations were integral players in the amendment process. The inclusion of some provision for aboriginal rights in the constitution was taken for granted.

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[411] *R. v. Sparrow*, p. 1116.

But while the scope of aboriginal rights was expanded and greater legitimacy was accorded to aboriginal demands it can not be said that aboriginal rights were recognized, by 1993, as inherent rights. This state of affairs is not due entirely to the defeat of the Charlottetown Accord.

For example, the construction of aboriginal title as a subordinate form of title was meant to satisfy the political ends of the British Crown. Support for this construction is derived from judicial decisions but it must be noted that the judges who rendered these decisions were operating within the context of the legal system designed to support the political ends of the British Crown.

In principle there is no reason why the title claimed by the British Crown should have been considered superior to that claimed by the aboriginal peoples. There is no characteristic of the British people or their legal system that would naturally give them priority. This is a point which underlies the aboriginal position on aboriginal title.

The result is that although various decisions of the SCC served to broaden the scope of aboriginal rights as recognized in Canadian law this expansion took place, and can only take place, within what the court viewed as the bounds of Canadian law.

Three examples illustrate this. First, the SCC recognized aboriginal title as a pre-existing right, one which survived attempts by Canadian governments to extinguish it. However the court also held, in *Guerin*, that "Indians have a legal right to occupy and possess certain lands, *the ultimate title to which is in the Crown.*"[412] Second, the existence of a fiduciary obligation works to the advantage of aboriginal peoples. However this obligation also infers a relationship where aboriginal peoples are subordinate to the federal government. Finally, the enumeration of criteria for testing the validity of an infringement of aboriginal rights restricts the action of the Government of Canada in limiting aboriginal rights. However the fact remains that the federal government *can* limit aboriginal rights if it can satisfy the criteria. The agreement of an aboriginal community is not required. In each case the principle of parliamentary sovereignty, within the bounds of the constitution, is upheld.

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[412] *Living Treaties: Lasting Agreements*, p. 8. Emphasis added.

Generally speaking the effect of these events was the same in the Yukon as it was elsewhere in Canada: to increase the scope and legitimacy of aboriginal rights. However given the fact that negotiations were under way in the Yukon this effect had practical consequences.

Negotiators from all sides indicated that the parties were interested in a "made in the Yukon" solution to the CYI claim. However this solution could not be made in isolation from events at the national level, especially when one considers the effect these events had on federal policy. One can see this effect in the contrast between the provisions of the AIP which was rejected in 1984 and the UFA. Interviewees indicated certain reasons for the rejection of the AIP. These were: not enough land, inadequate self-government provisions, the continuing insistence on the extinguishment of aboriginal title, and the secretive, adversarial negotiating process.

The problems with the negotiations process up to 1984 were discussed in Chapter Three. As for self-government, it "wasn't on the table when negotiations started." This was a problem because YFNs indicated as far back as *Together Today for Our Children Tomorrow* that they desired local, self-governing institutions. The more negotiations went on, the more YFNs became convinced that self-government was the vehicle needed to ensure that the agreements were implemented.[413]

The AIP did not "guarantee any special political rights for Yukon natives."[414] The form of local government provided for was essentially that of a band council under the *Indian Act*, with the addition of certain responsibilities regarding the administration of the benefits of the claim.[415] The federal government was in the midst of constitutional discussions with regard to self-government and wanted to deal with the issue at that level before implementing anything locally.

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[413] Paul Birckel, August 31, 1993.

[414] Whittington p. 84

[415] "Self-Government Briefing: Yukon Indian Land Claims Negotiations" (June 1987). LCS file LC 87-650.

The territorial government, meanwhile, was pursuing a policy of "one government for all Yukoners." YFNs were guaranteed representation on boards dealing with issues such as land use planning, wildlife management, and environmental assessment and review.[416] Similar provisions are contained in the UFA but the important difference was the lack of provision for YFN self-government.

These provisions for self-government seemed especially inadequate when read in the light of the Penner Report. In addition the constitutional discussions could only have served to convince YFNs of the necessity of self-government and the legitimacy of their claim to it. Combined with the rejection of the AIP, the continuing opposition of YFNs to the federal government's position, and the election in 1985 of a Yukon government which viewed the right of self-government as an inherent right, events at the national level doomed the federal policy in the Yukon.

Events in the Yukon were also directly affected by the recommendations of the Coolican Report, specifically the recommendation that the federal government find alternatives to extinguishing aboriginal title. When the CYI claim was launched the federal government proposed to resolve the uncertainty caused by the assertion of aboriginal title by requiring the total extinguishment of aboriginal title on all lands in the Yukon. This requirement was maintained throughout the negotiations of the 1970s and the early 1980s. As a result the 1984 AIP would have extinguished aboriginal title.[417]

In its submission to the Task Force to Review Native Claims Policy the CYI reiterated its rejection of extinguishment:

> The Aboriginal Title of Yukon Indian People to their homelands has been left intact from time immemorial and has not been extinguished by either conquest,

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[416] Whittington pp. 84-86

[417] Whittington p. 84

> purchase, treaty or legislation. These rights are essential to our people, and are not for sale.[418]

Comprehensive claims negotiations were seen "as the preferable device to *perpetuate* this sacred trust."[419]

In its submission to the task force the Yukon Government stated that

> Federal policy should not aspire to extinguish aboriginal rights but rather should seek a balancing of everyone's rights in a social contract capable of evolving harmoniously with the changing values of the constituent cultures in Yukon.[420]

The territorial government concluded its statement on extinguishment by stating that "[w]hat is needed for today is the extinguishment of uncertainty, not the extinguishment of rights."[421] This statement brings up an important point as regards federal policy and aboriginal rights.

Federal policy on aboriginal rights had always viewed three concepts - certainty, finality, and extinguishment - as inextricably linked. In short, agreements with aboriginal peoples must bring certainty to aboriginal, non-aboriginal relations: each side must know what its rights will be and how these rights will be put into practice. Certainty can only be achieved by concluding agreements which will be final: there could be no allowance for the growth of rights in the future or the lodging of additional claims once agreements are signed. In turn finality can only be achieved by extinguishing aboriginal rights because aboriginal rights are so all encompassing and vague. Aboriginal rights were be replaced by rights strictly defined in negotiated agreements.

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[418] CYI, "Submission to the Task Force to Review Native Claims Policy", LCS file LC 87-344, p. 14.

[419] CYI, "Submission to the Task Force to Review Native Claims Policy", p. 14. Emphasis added.

[420] LCS, "Yukon Government's Submission to the Federal Task Force On the Review of Comprehensive Land Claims, November 1985, p. 8. LCS file LC 87-343.

[421] LCS, "Yukon Government's Submission to the Federal Task Force on the Review of Comprehensive Land Claims", p. 8

In seeking to disentangle certainty, finality, and extinguishment the Yukon Government was aligning itself with YFNs -although there were some differences in their positions. Yukon Indians, like aboriginal peoples elsewhere in Canada, reject the idea that their rights and/or title ought to be extinguished in order to achieve certainty and finality. As outlined above a certain amount of uncertainty, and a lack of finality, is desired in order that the concepts of aboriginal rights and title be able to adapt to future circumstances. The Yukon Government's position seemed to be that acceptable levels of certainty and finality could be achieved without extinguishing aboriginal rights.

The federal government's 1986 comprehensive claims policy allowed that "alternatives to extinguishment may be considered provided that certainty in respect of lands and resources is established."[422] One acceptable alternative was

> the cession and surrender of aboriginal title in non-reserved areas while allowing any aboriginal title that exists to continue in specified or reserved areas; [and] granting to beneficiaries defined rights applicable to the entire settlement area.[423]

This shift in policy was possible once federal officials took the view that "it [was] academic to the Crown as to what was in aboriginal title...because [First Nations] were going to take all the risk."[424] The new thinking was that if the courts decided that aboriginal title meant nothing more than fee simple title the federal government would not lose anything. If the courts decided that aboriginal title included more than fee simple rights, these rights would be confined to settlement lands.

In Tim Keopke's opinion federal justice department officials probably did not think YFNs would go for this proposal. Neither did Barry Stuart. He thought that extinguishment

> was going to be an easy issue to resolve because whatever the law said about aboriginal title, it wasn't going to give the Indians as much as fee simple title. And I thought, as a lawyer and as an ex-prof, that I could easily prove...to the [CYI] negotiators...that they would be happier with fee simple title than they

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[422] Canada, *Comprehensive Land Claims Policy*, p. 12.

[423] Canada, *Comprehensive Land Claims Policy*, p. 12.

[424] Tim Keopke, July 27, 1993.

> would be with aboriginal title. Well I was right about the first part but I was wrong about the size of the problem. It wasn't that the negotiators...didn't appreciate that fee simple title was stronger... But they couldn't move, because most of the elderly and most of the communities, and now I think quite rightly, associated the extinguishment of aboriginal title with the extinguishment of their aboriginal ancestry.[425]

In the end retaining aboriginal title on settlement land was "exactly what the Yukon Indians wanted".[426] This shift in policy was "a major breakthrough", one which allowed negotiators to "create a legal fiction that...has all the attributes of fee simple [which] makes it administratively possible to deal with the lands."[427]

While the change in federal policy was crucial it did not mean that negotiations regarding extinguishment would be easy. As Keopke mentioned federal officials did not seem to believe that aboriginal peoples would embrace the proposed alternatives to extinguishment. When they did there was some resistance to negotiating alternatives.

The negotiators in the Yukon had worked out a way of dealing with extinguishment based on what they saw as the interest of government which was that the agreement not create "more uncertainty than existed before the land claim." This solution was reached by establishing "an interest-based negotiating task force" that looked at the question of extinguishment. Through this task force Yukon negotiators believed they could "come up with the legal language" that would give certainty yet allow YFNs to keep aboriginal title.[428] Stuart felt that retaining aboriginal title was a good idea.

> What risk are we possibly going to have in allowing them to continue to keep aboriginal title on their land, insofar as it's not inconsistent with the land claim agreement ? What other guarantees do we need ?[429]

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[425] Barry Stuart, August 17, 1993.

[426] Tim Keopke, April 10, 1994.

[427] Tim Keopke, July 27, 1993.

[428] Barry Stuart, August 17, 1993.

[429] Barry Stuart, August 17, 1993.

Unfortunately federal officials did not share his view. DIAND insisted that the existing policy could not be changed because that had always been their policy. To Stuart this was "not a good enough reason." More ominously it indicated to him that federal officials did not realize that "[n]egotiating a land claim means each party has to change its position to accommodate the other parties."[430]

Eventually Yukon negotiators were able to get past that roadblock. However DIAND then said that extinguishment was not really their policy but that of the federal justice department. So Yukon negotiators went to the department of justice. Justice officials said that it was "just a legal issue" and that the policy could be changed if DIAND wanted it changed. Yukon negotiators went back to DIAND who passed the issue back to Justice. Eventually it was decided that it was an issue for the justice department.[431]

But even though the Department of Justice accepted the issue it did not accept the Yukoners' proposed solution. The justice department initially took the position that due to litigation that was going on at the time it could not have the Yukon solution as a precedent in a land claim agreement because it would follow the litigation where there were no agreements.[432]

In order to contest this position Yukon negotiators hired a person who at one time headed up the justice department's constitutional litigation branch and had since gone into private practice. He offered the opinion that no court would use what was contained in a treaty as a legal precedent for a non-treaty area.[433]

The justice department's next position was that it might be a constitutional problem and they needed to consult a constitutional expert, who happened to be Peter Hogg. Stuart knew Hogg having taught law with him at Osgoode Hall. He called Hogg and hired him to give them an opinion on the issue. Stuart kept that opinion in reserve and when the objection was raised in negotiation he presented the federal justice officials with Hogg's opinion, one which was favourable to the position taken by Yukon negotiators. In the end the Yukon negotiators "had to pin them right up against the wall where they had no place to move" but to admit that their objection had no basis. Once the Yukon negotiators got them to admit that they were able to insist that if they did not "have any good reason for opposing it it's in the land claim agreement. That's eventually what happened."[434]

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[430] Barry Stuart, August 17, 1993.

[431] Barry Stuart, August 17, 1993.

[432] Barry Stuart, August 17, 1993.

[433] Barry Stuart, August 17, 1993.

Stuart gives credit to some people in the Department of Justice who were willing to re-evaluate some of the positions they had inherited.

> A couple of very senior people in the department of justice looked at it and said, "Yeah, you're right. The hundreds of lawyers who have said "You're wrong" are wrong. And we'll do it.[435]

This paved the way for the provisions which were ultimately written into the UFA.

Where the issue of extinguishment illustrates the connection between changes in federal policy and the content of the UFA, the effect of the *Sparrow* decision illustrates the connection between the legal and political aspects of claims negotiations.

At first glance the *Sparrow* decision, because it addressed the practical and important issue of the allocation of scarce resources, appeared to hold serious consequences for the UFA. The probability of some kind of impact increased when, shortly after the decision was handed down, the CYI commissioned Peter Hogg to assess the significance of the decision for the CYI claim. At that point the chief negotiators had initialled the UFA but the parties had not yet ratified it.

Hogg advised the CYI "to revisit some of the provisions in the agreement." He believed that government would agree to this "because they have read Sparrow as well."

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[434] Barry Stuart, August 17, 1993.

[435] Barry Stuart, August 17, 1993.

In Hogg's view "Sparrow changes the background law in which negotiations took place."[436]

Hogg's primary concerns were the lack of constitutional protection for self-government, the wildlife management and harvesting arrangements, the recognition of aboriginal rights, YFN involvement in land dispositions in the Yukon, and the requirement that YFNs pay back money borrowed from the federal government to negotiate the claim.[437] In Hogg's view the last stipulation constituted a breach of the federal government's fiduciary obligation to aboriginal peoples.[438]

CYI and YFN representatives were receptive to Hogg's advice at the time and anticipated that changes would be forthcoming. Federal negotiator Tim Keopke was non-committal, saying that the federal side had anticipated Hogg's recommendations and that any changes would be "policy considerations" that the federal government would have to make after its assessment of the SCC's decision.[439]

In the end *Sparrow* had little effect on the content of the UFA. According to Keopke some provisions were changed but there was no wholesale rewriting. As we have seen in our above analysis of the provisions of the UFA, the federal government did not agree to constitutional protection for self-government, would not explicitly recognize aboriginal rights, and stuck to the pay back provisions.

Why did this decision, one which "was heralded by Aboriginal leaders as a major victory,"[440] have such a limited impact on the UFA ? Part of the reason was the federal government's approach to the decision. According to Keopke the federal government considered *Sparrow* a "site-specific decision." As such the parties were not inflexibly bound by what the court had said.[441] This was augmented by the federal government's position that "the Sparrow doctrine said you can negotiate any exclusion or exception from those rights as part of a balanced package."[442]

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[436] Chuck Tobin, "Re-open parts of land claim, CYI advised", *Whitehorse Star*, September 21, 1990, p. 6.

[437] This last issue will be discussed in further detail below.

[438] Tobin, "Re-open parts of land claim, CYI advised"

[439] Chuck Tobin, "CYI will consider professor's land claim advice Oct. 9" *Whitehorse Star*, September 25, 1990, p. 5.

[440] Kulchyski p. 213

The other reason for this lack of impact was the foresight displayed by the UFA negotiators. The negotiators discussed *Sparrow* before the SCC dealt with it and correctly anticipated the Court's decision.[443] In keeping with *Sparrow* conservation and aboriginal need were given top priority. However the parties also agreed early on that non-Indian harvesting had to be addressed due to the mix of Indians and non-Indians in Yukon communities.

The UFA has a fish and wildlife management regime in which the parties negotiated a total allowable harvest and a basic needs level. If fish and wildlife numbers decrease there is a formula for sharing the resource between Indians and non-Indians. There is even a provision for the exchange of allocation from different areas.[444] The end result, according to Stuart, is that YFNs have "much better than Sparrow-like rights."[445]

But while Sparrow had little effect on the content of the UFA there was a political aspect to the decision that is not reflected in the provisions of the agreement.

Tony Penikett believes that Sparrow made "it much easier to argue with the hunting and fishing fraternity that didn't like" the UFA provisions. Some Yukoners, according to Penikett, were "willing to defer to the Supreme Court...[but] not accept the fact that sensible people in the Yukon might negotiate [an]... agreement" based on similar principles. The parties to the negotiation were able to use *Sparrow*, essentially saying

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[441] Tim Keopke, July 27, 1993.

[442] Tim Keopke, April 10, 1994.

[443] Barry Stuart, August 17, 1993.

[444] Tim Keopke, July 27, 1993.

[445] Barry Stuart, August 17, 1993.

"this is a Supreme Court of Canada decision - it's the law." However not everyone was swayed by the decision.[446] In the end

> the fact that we could actually say there was a sharing of the harvest meant an awful lot in terms of politically being able to sell the agreements here in the Yukon. In the end...the biggest principle of all is, are we going to be able to live together ? Can both communities live with this ? And, can we live together after this ?[447]

I indicated above that one of the problems associated with pursuing aboriginal claims through legal means is a Canadian court's inability to recognize aboriginal rights as inherent rights. Penikett's comments illustrate an advantage of the legal approach: that a court decision which supports the provisions of a negotiated agreement can help legitimize that agreement in the eyes of the general public. However as Stuart points out a contrary decision can have the opposite effect.

> [H]ad Sparrow gone the other way I think the deal would have [been] had a very, very hard sell in the non-aboriginal community.[448]

In fact he believes that "had we not been able to recognize, as *Sparrow* did, the historic, legal, and cultural, as well as the moral obligation we would not have...been able to persuade...our own team [of] the need to recognize those interests."[449]

The Position of the Government of the Yukon.

Former Yukon Commissioner James Smith recalls that when Yukon Indians first started pressing their demands the territorial council was sympathetic to the "Native situation." The council forced the issue with the federal government on giving Indians the vote, removing restrictions on access to alcohol, and desegregating schools.

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[446] Tony Penikett, July 28, 1993.

[447] Tony Penikett, July 28, 1993.

[448] Barry Stuart, August 17, 1993.

[449] Barry Stuart, August 17, 1993.

> For their time they were very progressive in their outlook and quite aggressive in being a champion of the Native cause.[450]

However this approach did not satisfy Yukon Indians. The territorial government's policy was based on a liberal-individualist approach. There was little enthusiasm for special rights for Yukon Indians, through self-government or land claims. The approach was integrationist, an attempt to bring Yukon Indians into Yukon society on the same terms as other Yukoners, with the same rights as other Yukoners. The territorial government was in favour of instituting programs that helped out Indians with their socio-economic difficulties because they needed the help, not as a recognition that they had any special rights.[451]

The Government of the Yukon's first policy statement on the land claim was released in October 1974. In it the Yukon Government recognized that a settlement was necessary since

> Indian people have occupied parts of the Territory for a substantial length of time and various rights associated with their traditional use and occupancy of the land have never been extinguished and may never have been superseded by law.[452]

Yet while the territorial government's analysis was in keeping with the federal government's 1973 comprehensive claims policy its position echoed the 1969 White Paper.

The Yukon Government's goals with regard to the negotiations included "attaining responsible government for Yukon", "the termination of legal distinctions based on race", and the provision to Indian people of "all rights, privileges and obligations inherent in Canadian citizenship." To accomplish this the settlement would have to be binding and

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[450] James Smith, August 30, 1993.

[451] James Smith, August 30, 1993.

[452] Government of Yukon. Land Claims Administrator. *Analysis & Position: Yukon Indian land claims.* Queen's Printer. Whitehorse. 1974. p. 3.

"extinguish all existing claims, special rights, privileges and obligations of Yukon Indian people."[453]

And while the Yukon did not entirely reject compensating Yukon Indians the amounts of money and land involved were very small. They were willing to "give" 1200 square miles (3108 square kilometres), to be held collectively and individually by Yukon Indians in fee simple. YFNs would be offered $ 25-30 million in exchange for the extinguishment of their aboriginal rights.[454] As far as political rights were concerned the Yukon Government believed that "community development" could best be achieved through changes to the *Local Improvement District Ordinance* and the *Municipal Ordinance*.[455] This position was the foundation of the Yukon Government's version of the *one government model*: the incorporation of Yukon Indians, and their local governments, into the existing political framework.

The territorial government's position, which was diametrically opposed to the demands in *Together Today for our Children Tomorrow*, can not be understood without considering the political and constitutional context of the time.

Constitutionally, the Yukon (like the NWT) is a subordinate entity. Unlike the provinces the Government of the Yukon enjoys no constitutionally protected status. It exists by virtue of a piece of federal legislation, the *Yukon Act*. "[I]n this sense", writes Whittington, "[its] legal position vis-a-vis the federal government is analogous to that of a municipal council vis-a-vis a provincial government."[456] The Government of Canada has the legal authority to amend the *Yukon Act*, and so restructure the Government of the Yukon government, without the consent of, or even consulting with, the territorial government.[457]

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[453] Yukon, *Analysis & Position*, p. 3.

[454] Yukon, *Analysis & Position*, pp. 5-6 and p. 24.

[455] Yukon, *Analysis & Position*, p. 7.

[456] Whittington p. 70.

[457] Cameron and Gomme, p. 7.

Still, the territorial government displays many of the attributes of provincial governments. It is a fully responsible form of government. The Executive Committee (Cabinet) is drawn from members elected to the 17 seat legislative assembly. Since 1978 elections have been contested by political parties. Though its authority is delegated to it by the federal government, this authority now covers a wide range of areas (social services, education, small business development, tourism, renewable resource development). Certain important areas of jurisdiction remain in the hands of the federal government. However the federal government has recently announced that it will open negotiations to devolve all remaining "provincial" powers to the territorial government by April 1, 1998.[458]

The situation was much different in the early 1970s. At that time one author characterized the territory's political system as "a curiously archaic system that is quasi-colonial in structure."[459] The chief political officers of the territorial government were the Commissioner and two Assistant Commissioners, all of whom were appointed by the federal government. The executive committee consisted of these three federal appointees and two members from the then seven member, elected territorial council.[460]

There were two interrelated problems with this arrangement. First, it was not a system of responsible government. The executive committee did not have to follow the wishes of the elected members and the Commissioner was considered, at least by some, as "the errand boy and territorial receptionist for Ottawa."[461] Second, even if it were made responsible the territorial government was almost powerless. It was supposed to pass ordinances "for the good government of the territory" but the territorial civil service was under the direct control of the Commissioner. Furthermore the Council had "no power over money bills except to vote against them." As such it was derided as "the most expensive form of unemployment payment in the country."[462]

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[458] The jurisdictions to be devolved to the territorial government include: administration and control of Crown lands; greater control over resource royalties; mining and minerals administration and management; and, management of forests, water, and land. INAC, *Devolution of the Northern Affairs Program to the Yukon Government: A Federal Proposal*. Minister of Public Works and Government. Ottawa. 1996. p. 2 and pp. 4-5.

[459] Jim Lotz, *Northern Realities: The Future of Northern Development in Canada*. new press. Toronto. 1970. p. 64.

[460] On April 10, 1974 the *Yukon Act* was amended to increase the size of the territorial council to 12 members. The first twelve member council was elected on November 18, 1974. On September 26, 1974 DIAND minster Judd Buchanan authorized the replacement of one appointed member of the Executive Council with a third elected member. (Steven Smyth, *The Yukon's Constitutional Foundations, Volume I: The Yukon Chronology*. Northern Directories Limited. Whitehorse. 1991. pp. 42-43.)

This state of affairs brought about a movement, which grew especially vocal in the 1960s and early 1970s, for full responsible government, greater autonomy, and a process by which the Yukon could eventually become a province.

Given this context there was a need to determine what that would mean "in practical terms."[463] In the view of those who favoured the constitutional and political evolution of the Government of the Yukon this had to be worked out in such a way as to increase the institutional integrity of the territorial government. The political development of the Yukon was seen as a zero sum game, any gain by Yukon Indians would be a loss for non-Indian Yukoners. Without constitutional development the territorial government faced the prospect of being transformed into a "rump parliament", its subordinate constitutional status further circumscribed by the terms of a land claims agreement.

The only way to safeguard territorial government interests was to position constitutional development and the devolution of authority from the federal government to the territorial government as a parallel process to land claims.[464] Art Pearson described territorial cooperation in land claims negotiations as a "quid pro quo" for constitutional development and devolution.[465]

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[461] J.K. McKinnon, "Seven Come Eleventh", p. 3. "Seven Come Eleventh" is an entertaining and informative manifesto on the issue of constitutional development for the Yukon. It was published as a series of articles in the *Whitehorse Star* in October and November of 1966. My copy was supplied by the author. Ken McKinnon was a territorial councillor at the time of publication. He would later serve as Commissioner, though the Commissioner's role was largely ceremonial by then.

[462] Lotz p. 65, p. 77, and p. 79.

[463] Interview with Gordon Steele, land claims administrator for the LCS, 1975-1982; principle secretary to the government leader, 1982-1985 and 1992-1996; July 29, 1993.

Over the years the amounts of money, land, and the extent of political rights which the territorial government would accept increased. This, however, was in response to demands made by CYI which were accepted by the Government of Canada. The essential contention that gains for the CYI constituted losses for the territorial government remained. As such land claims and constitutional development operated as conflicting, rather than parallel, processes. This was especially true with regard to the control of Crown land and the development of lands claimed by YFNs.

It was not until the election of the territorial NDP in 1985 that the perspective on aboriginal rights, and the relationship between land claims and constitutional development, changed. The political context in which the NDP was elected was defined by the fact that land claims negotiations had broken down in the wake of the rejection of the 1984 AIP. In Tony Penikett's view the approaches taken to land claims by the NDP and the previous Progressive Conservative (PC) government was one of the biggest differences between the parties. According to Penikett the previous government believed its role

> was to represent the interests of the white people in the territory. I think they saw the CYI representing Indians, they saw themselves representing the whites, and the federal government representing itself. Our approach was to argue that...[t]he territorial government had to take the position of representing the broad public interest, including the interests of the aboriginal people, if [it] wanted to claim to govern for them, and on behalf of them which [it was] also claiming to do. You couldn't go to the table only representing white people.[466]

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[464] Gordon Steele, July 29, 1993.

[465] Interview with Art Pearson, Commissioner of the Yukon, 1976-1978, July 29, 1993.

[466] Tony Penikett, July 28, 1993.

The NDP also believed that the territorial government should not be trying to piggy-back its demands for greater autonomy, constitutional development, and control over land onto aboriginal demands. In his view the government should have been

> focusing on what the objective of this exercise is, which is not to get provincehood, not to get land for white people, but to in fact settle this question of aboriginal rights.[467]

However it should not be concluded that the NDP abandoned the constitutional development/devolution agenda. Penikett's government simply took a different, less confrontational approach. Penikett believed that once YFN claims were dealt with the territorial government would gain leverage for its demands. If YFNs were able to secure control of land and resources it would improve the position of the territorial government in securing similar control.[468]

At one point Penikett had a letter of understanding with DIAND minister Tom Siddon that once final agreements were signed with YFNs there would be bulk transfers of land to the Government of the Yukon. It would be a question of simple equity.

> How can you say that the First Nations, one group here, have this kind of powers over their land and their resources but the rest of the people in the territory don't ? I mean it seems to me that would have been a fairly persuasive constitutional argument, especially on the basis of simple justice.[469]

Other differences between the actions taken by the PCs and the NDP, such as bringing in the principled negotiations process, were more matters of style than substance. The question of land quantum was significant, as was the fact that the NDP was willing to go further with regard to self-government. But the fact that the NDP saw itself as working on behalf of all Yukoners at the land claims table "was the fundamental difference in [the NDP's] approach."[470]

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[467] Tony Penikett, July 28, 1993.

[468] Tony Penikett, July 28, 1993.

[469] Tony Penikett, July 28, 1993.

[470] Tony Penikett, July 28, 1993.

Beyond general principles Penikett said that when the NDP formed the government his caucus did "not [have] highly predigested views on detail questions." He blamed this on the secretive nature of the previous negotiations process. As a result when the NDP was in opposition MLAs could only discuss YFN claims as a matter of principle. There was also differences within caucus about how to deal with the issue.[471]

As a social democrat his view of aboriginal rights was initially based on a class analysis: "most aboriginal people were poor and most poor people in the territory were aboriginal." It was only later that he appreciated the legal foundation of aboriginal claims, claims which were "valid regardless whether people were poor or not."[472]

Penikett attributes this change in views to two factors. The first factor was that the chief negotiator he hired, Barry Stuart, was a former law professor. This increased his appreciation of the legal nature of aboriginal rights. The second factor was the sophistication of the YFN negotiating teams. His understanding of aboriginal rights as inherent rights came later and was based on a growing appreciation of the significance of the historic occupation of the Yukon by YFNs and the questions this raised regarding legitimacy of Canadian governments in the territory.[473]

All this directly affected the government's approach to aboriginal rights. The Yukon NDP was the first government in Canada to recognize the right to self-government as an inherent right, to not require extinguishment of aboriginal title as a condition of settlement, and to accept that aboriginal title continues to exist on settlement land.[474]

Procedurally, it was also during this period that the principled negotiations process was implemented, although this change was due to the influence of Stuart rather than Penikett or his caucus.[475]

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[471] Tony Penikett, July 28, 1993.

[472] Tony Penikett, July 28, 1993.

[473] Tony Penikett, July 28, 1993.

[474] Tony Penikett, July 28, 1993.

[475] Tony Penikett, July 28, 1993.

Internally, one important aspect of the NDP tenure was that Penikett assumed cabinet responsibility for land claims. As the head of the government he was able to designate land claims as the government's key priority and ensure that adequate resources were committed to negotiate and implement agreements.[476]

From the perspective of the chief negotiator the direct involvement of the Government Leader is essential for successful negotiations. According to Stuart "you have to have the politicians directly involved because the decisions cannot be made by bureaucrats."[477] Shakir Alwarid said that if Penikett had not been dedicating the resources, money, and "political capital" to the process the agreements would not have happened.[478]

Alwarid and Stuart indicate three areas in which direct political involvement is influential. The first area, reiterating Penikett's comment, is that of resources. Alwarid says that he had "almost unconstrained financial resources" to hire the legal and technical expertise needed to negotiate the claim.[479]

The second area was the degree of access that the chief negotiator had to the Government Leader.[480] Stuart said that he "could walk into the Premier's office any moment out of any day that I wanted to or I needed to."[481] The third consideration was the fact that

> [e]very Deputy Minister was instructed that cooperating with, and assisting in, the conclusion of land claims [was] the number one priority for every Deputy

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[476] Tony Penikett, July 28, 1993.

[477] Barry Stuart, August 17, 1993.

[478] Shakir Alwarid, July 30, 1993.

[479] Shakir Alwarid, July 30, 1993.

[480] Shakir Alwarid, July 30, 1993.

[481] Barry Stuart, August 17, 1993. During the tenure of the NDP government Penikett assumed the title of Premier, as he was allowed to do according to the October 1979 Letter of Instruction to the Commissioner from DIAND minister Jake Epp. (Cameron and Gomme, p. 159). All other heads of government, before and since, have used the title "Government Leader."

> Minister...That gave a lot of clout to the chief negotiator to call on departments during tough negotiations.[482]

The end result was that the chief negotiators had a high level of confidence in their mandate. Alwarid said he "agreed to many things and...made decisions many, many times where I did not feel I needed to go back to the individual department or to the Premier because I was given the mandate to get it done."[483] Stuart said that the negotiators from the other parties knew that he wasn't "simply a warm body at the table trying to stickhandle [his] way and make sure that [he] stayed within [his] mandate." It was clear that he had the authority to find a fair deal.[484]

Opinions vary on the effect that the election of the NDP had on the outcome of negotiations. Paul Birckel said that after the election of the NDP YFNs were able to get their "foot in the door quite a bit better." Still, he believes the most important factor was the increased confidence Yukon Indians gained as the process went along.[485] Victor Mitander believes that on some things the NDP was

> more supportive of aboriginal interests, rights, and title than any other former government in Yukon. In my view...up until Tony took over there was basically a conservative element that controlled the Yukon and wanted business as usual, which was just not possible in view of the outstanding claims that were there.[486]

Dave Keenan, however, expressed some reservations. With regard to land claims the chief negotiator may have had a free hand to operate within his mandate but not everything was "on the table." YFNs had to push to get certain things on the table and once they were, the territorial negotiators, in his view, had less of a free hand. And while the territorial

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[482] Shakir Alwarid, July 30, 1993.

[483] Shakir Alwarid, July 30, 1993.

[484] Barry Stuart, August 17, 1993.

[485] Paul Birckel, August 31, 1993.

[486] Victor Mitander, September 1, 1993.

NDP may not have tried to superimpose a constitutional development/devolution agenda over that of land claims, neither was it receptive to YFN participation in that area.[487]

Gordon Steele believes there is a greater degree of continuity in what happened before and after 1985 than a pre-NDP, post-NDP analysis suggests. In his view the 1984 AIP, while it was not ratified, settled a lot of issues and this is reflected in the UFA. As such changes contained in the UFA - the development of agreements with individual YFNs, rather than attempting one agreement for the whole territory; the increased land quantum; the greater degree of self-government; the retention of aboriginal title on settlement lands - should be seen as part of a learning curve which began in 1973 and continues to this day.[488]

Steele's analysis is supported by the previous section which indicates that all of Canada was going through a process of understanding aboriginal claims, coming to grips with them, and accepting at least some of them. This started before negotiations began in the Yukon, and continued after the election of the territorial NDP. This process of discovery was bound to have a great impact upon any attempt to negotiate comprehensive land claims and self-government agreements in a shifting and expanding constitutional, political, and intellectual environment. Even if the 1984 AIP had been ratified it surely would have been regarded as inadequate by YFNs in the light of subsequent developments.

Perhaps surprisingly Penikett is rather modest about the influence his government had. While he believes the influence was positive he does not think it was "miraculous."

> It was like a river cutting a new course...maybe around some problems...I think it made a difference but I wouldn't want to overstate it. I'm not sure I have enough distance from the events yet to be able to say whether the approach we took ...would have happened anyway in time.[489]

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[487] Dave Keenan, August 5, 1993.

[488] Gordon Steele, July 29, 1993.

[489] Tony Penikett, July 28, 1993.

Penikett's modesty is influenced by his rejection of the "Great Man Theory of History." While he believes that "the brilliance of certain people...at critical moments...really made a difference" he also considers the land claims agreements to be "collective agreement[s] of the whole community...in which hundreds of people were involved."[490]

It is also worth noting that the effect that the negotiating position of the territorial government had on the process was bound to be limited by its constitutional status. This was evident from the start of negotiations. The Yukon Government's subordinate status and its ability to participate in the negotiations was a constant issue from 1973 until the 1985 MOU. It is legally possible for the federal government to reach an agreement regarding land with YFNs without the consent of the territorial government.

Such an agreement occurred in 1991 when the Government of Canada reached a land claim agreement with the Tetlit Gwitchin, based in Ft. Macpherson, NWT. This agreement legally recognized certain hunting rights for the Gwitchin in the Peel River area in the Yukon, rights which the Gwitchin had historically exercised. The territorial government did not object to the recognition of Gwitchin rights only that this agreement was finalized without its consent.[491]

Yet the difference between the constitutional situation and political practice must be emphasized. It would have been extremely difficult for the federal government to proceed without the participation and agreement of the Government of the Yukon in negotiations that would affect the future of the territory so fundamentally. This would have been an extremely unpopular move and regarded as illegitimate, whatever the legal realities were. The federal government realized this. In his January 1979 letter of Instruction to the Yukon Commissioner, DIAND Minister Hugh Faulkner recognized that "the implementation of [a] settlement will clearly require Territorial participation."[492]

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[490] Tony Penikett, July 28, 1993.

[491] Chuck Tobin and Sarah Davison, "Yukon land goes to the N.W.T.", *The Whitehorse Star*, July 12, 1991, p. 5.

[492] Cameron and Gomme, p. 153.

Excluding the Government of the Yukon from the negotiations would also have made relations between it and the federal government extremely difficult. As mentioned powers continue to be devolved from the federal government to the territorial government.[493] Politically, then, there were good reasons for the federal government to refrain from acting unilaterally in dealing with the CYI claim.

There are also reasons to suspect that what happened after 1985 was not simply a continuation of the learning curve. After all the PCs opposed the land claims policy of the NDP, just as the NDP opposed the land claims policy of the PCs before it, and the Yukon Party that succeeded it. It may very well be that legally the territorial government could not have altered the evolution of the negotiations. But the territorial government, under the NDP, was the first party to the negotiations to support the principled negotiations process which, as will be seen, is regarded as an important step by many of those involved in the negotiations. It could also be argued that the different approach of the NDP was politically significant in that its support for aboriginal rights, and its position on constitutional development, suggested that Indian and non-Indian aspirations were complementary, thereby paving the way for greater public acceptance of the outcome of the land claims negotiations.

The Principled Negotiations Process.

The principled negotiations process diluted the effect that any one philosophical approach - such as aboriginal rights as inherent rights - would have on the outcome. This dilution occurred because the process required that the parties to the negotiations think in terms of negotiable interests, rather than established positions. In order for negotiations to be successful parties have to be willing to move from positions which may be founded on rights claims to accommodate the interests of the other parties. The open and community-based aspects of the negotiations also diluted the effect any one philosophical approach could have on the process by involving more people, and hence a greater variety of interests and views, to be accommodated.

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[493] In fact the same week that Tom Siddon signed the UFA and land claims and self-government agreements with YFNs, he signed a Northern Accord with the territorial government
giving it greater control over natural resources in the territory.

Although this process shifted the focus away from rights the CYI supported the move from an adversarial process to one based on principled negotiations. Victor Mitander believes the principled negotiations approach is "one of the better ways of negotiating land claims agreements" compared to the adversarial process used to negotiate the 1984 AIP or other agreements. This is partially due to the fact that this process, by involving more people and focusing on interests, has the potential to offset the difference in power between the Government of Canada, provincial and territorial governments, and First Nations.[494] YFN support for the principled negotiations process was also based on the fact that it was more in keeping with traditional YFN modes of decision making.[495]

Despite these two factors Barry Stuart believes that it took "tremendous courage" for YFN chiefs and negotiators to accept the principled negotiations process. After years of adversarial negotiations it would have been easier for them to simply blame any lack of progress on government. This tactic can galvanize the community behind that leadership. In accepting the principled negotiations process YFN leaders had to tell their people that they would not get all they wanted from their agreements but would probably get what they needed. The onus would be on the YFN leadership to explain how the results satisfied their community's interests.[496]

The true test of the principled negotiations process was the way in which it dealt with the issues which had sunk the 1984 AIP: the federal policy of extinguishment, the lack of self-government powers, the inadequate land quantum, and the secrecy surrounding the negotiations and the lack of community involvement in those negotiations.

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[494] Victor Mitander, September 1, 1993.

[495] Paul Birckel, August 31, 1993.

[496] Barry Stuart, August 17, 1993.

The relationship between events at the national level and negotiations in the Yukon was symbiotic. While changes in federal policy were influenced by legal decisions, FMCs, and parliamentary reports, the principled negotiations process was important in determining how that policy would be applied in the Yukon.

We have already seen how Yukon negotiators dealt with the issue of the extinguishment of aboriginal title. Changes to the federal mandate in the Yukon regarding extinguishment came in the wake of the Coolican Report and the 1986 federal comprehensive claims policy.[497] However, while the Coolican report may have been instrumental in convincing the federal government of the need for alternatives to extinguishment it was the negotiators in the Yukon, using the principled negotiations process, who engineered the alternative contained in the UFA.

Once the Yukon negotiators reached this agreement they had to deal with resistance to it in Ottawa. In dealing with the intransigence of DIAND and the federal justice department the three parties acted together. This co-operation required an attitudinal change: the parties had to see themselves as working together to solve a problem, albeit from different perspectives and representing a different set of interests. This could not have been done in an adversarial process with each side trying to get the best of the others.

And so it was with self-government. The Penner report and the FMCs helped set the stage for change but it was at the negotiating tables in the Yukon that solutions, and ways of applying those solutions, were developed. In fact the current federal policy toward self-government is informed to a great degree by the work done in the Yukon. It is in many respects an attempt to offer the "Yukon model", or aspects of it, as one way of dealing with self-government in the provinces.

With regard to land quantum, the federal negotiators were convinced, by CYI negotiators, of a legitimate need for more land and were able to convince those in Ottawa of that need.[498] It is not clear that a change in negotiations process, as opposed to YFN refusal of the amount on offer, changed this aspect of federal policy.

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[497] Tim Keopke, August 23, 1993.

But Barry Stuart illustrated the way in which a principled negotiations approach can deal with the question of land quantum. When the CYI said that YFNs wanted a certain amount of land Stuart raised the question, why that amount of land ? The answer to the question revealed interests in access to wildlife and concerns about the environmental impact of non-traditional economic development. These issues were dealt with by guaranteeing YFNs two things. The first was continuing access to unoccupied Crown land for traditional purposes. The second was membership on management boards that controlled resources on, and the development of, non-settlement land. As a result an agreement was reached regarding land quantum. YFNs accepted outright ownership of a smaller amount of land because mechanisms were put in place whereby they could exercise control over land, and have access to wildlife, without outright ownership.[499]

In order to make the process open and community-based the negotiators travelled throughout the territory. This attracted quite a following. Some people attended meetings even though the talks might not be directly related to their community. There was also a communications strategy designed to get information out to all members of the general public, Indian and non-Indian. In this way the principled negotiations process helped generate public support for the agreements that were reached.

The generation of public support was necessary for two reasons. Support would have to be generated in YFN communities because those communities would have to ratify their agreements. Public support was also required because people, both aboriginal and non-aboriginal, are less deferential towards their leadership than they used to be. As a result agreements will not be seen as legitimate unless the public can be involved in the process. As Victor Mitander put it:

> Today, I think it's more and more important to let people know what's going on in the negotiations: what positions are being taken by First Nations and why ?;

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[498] Tim Keopke, August 23, 1993.

[499] Barry Stuart, August 17, 1993.

> why does government take this position, and what's the rationale behind their position ? I think it's important that Canadians understand what's being talked about. It's not in our interest to keep a lid on it.[500]

The open and community-based aspects of the negotiations process also spread some confusion. When the negotiators reached an AIP in 1988 some people complained because they could not get a copy of it. Afterwards they complained that they could not understand it.[501] The agreements deal with issues like land use planning, development assessment, heritage resources, fish and wildlife, and transboundary agreements in a very legalistic and technical fashion. CYI negotiators and other YFN officials spent a lot of time explaining the agreements in the communities but there are still people who do not fully comprehend them.[502]

The same could be said about non-Indians. There are probably relatively few people outside the process who fully understand the provisions of the agreements. What is ultimately important is whether their overall impression is favourable or not.

That broad support for the agreements was attained was no small feat. When the NDP was elected in 1985, in the wake of the rejection of the AIP, the prevailing attitude was "no land claims at any price and you couldn't even utter the word...self-government" in public. By 1987 people were ready to accept an agreement as long as it was fair. People wanted to get negotiations over with.[503]

In addition to the dissemination of information Stuart credits greater acceptance to "the courage of some of the First Nations" to open negotiations to those third party interests that wanted to get involved and to take the negotiations to the communities and let people, Indian and non-Indian, "come right in and watch some of the negotiations themselves."[504] Ultimately third party interests were accommodated in that all are protected by the UFA. There is a process for expropriation and compensation, however it is believed that only the outfitting industry will be affected by these agreements.[505]

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[500] Victor Mitander, September 1, 1993.

[501] Tim Keopke, August 23, 1993.

[502] Victor Mitander, September 1, 1993.

[503] Barry Stuart, August 17, 1993.

This is not to suggest that the principled negotiations approach eliminated all opposition. Some opposition, like that of third parties, was based on conflicting interests. While many of these issues were dealt with by incorporating third parties into the process not all members of these third parties are satisfied with the result.

There was also a whole other level of opposition which objected to the negotiations as a matter of principle. As late as 1991 there was a Coalition against the Umbrella Final Agreement. The coalition believed that the UFA constituted a form of racial discrimination in the way in which it conferred benefits to YFNs.[506] This movement lost steam rather quickly largely because of the level of support that existed for the UFA.

Stuart believes that any objection - no matter how extreme - can be dealt with by a principled negotiations process.

> During that process you'll find that the lunatic fringe will either accommodate or disappear. If you want to keep the lunatic fringe alive keep them outside. Then they've got legitimacy. If they come inside they have to have more than just the lunatic element. They have to have some very tangible, very significant legitimacy to stay at a table.[507]

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[504] Barry Stuart, August 17, 1993.

[505] Tim Keopke, April 10, 1994.

[506] See Brian Lueck, "I want to turn apathy into outrage", *Whitehorse Star*, April 12, 1991, p. 10; Brian Lueck, "Racial inequality is about to be law", *Whitehorse Star*, April 15, 1991, p. 7; Heather McFarlane, "Setting up a racially-separated society", *Whitehorse Star*, April 17, 1991, p. 10; Brian Lueck, "It's time we all demanded equality", *Whitehorse Star*, July 10, 1991, p. 10; "Stop The Umbrella Final Agreement", advertisement by the Coalition against the UFA, *Whitehorse Star*, July 11, 1991, p. 9;

[507] Barry Stuart, August 17, 1993.

Eventually those who are serious about negotiations will tune-out those who are being deliberately disruptive: "That person gets an opportunity to make everybody, including the press, aware that they're a fanatic."[508]

Mitander agrees with Stuart that "[t]he more people that understand the process, the more people that participate in that process" the greater the chance that the outcome will have a broad base of acceptance.[509] According to Stuart "if you get more people involved in shaping the agreement" there will be a sense of ownership in the agreement so people will feel they have an interest in making it work. This also develops a sense of the public's importance in the process, that it is not elite-driven. Increased participation also supports the well-being of the community because people see themselves as capable of dealing with their own problems.[510]

This is not to suggest that there were no problems with the principled negotiations process. The two most significant problems related to the process itself were the parties' lack of preparedness for principled negotiations, and the necessity of fixing a bottom line.

This lack of preparedness manifested itself in various ways. One problem was the articulation of interests. According to Barry Stuart most people enter negotiations without knowing what it is they really need. They therefore pursue wants, which are desired for various reasons. When the UFA negotiations began no party had adequately worked out what their underlying interests were. So it was difficult for parties to justify the positions they took at the negotiating table.[511]

A second problem concerned the establishment of the negotiating infrastructure. Stuart was an advocate of establishing a resilient process before dealing with substantive issues. He believes that most people think that all they have to do is talk about the problem and do not talk enough about "the bridge that's going to be built" between the parties "to carry the communication which is ultimately going to result in an agreement." In his view "[i]f you take the time at the beginning [to establish the process] then the products will come very quickly."[512]

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[508] Barry Stuart, August 17, 1993.

[509] Victor Mitander, September 1, 1993.

[510] Barry Stuart, August 17, 1993.

[511] Barry Stuart, August 17, 1993.

A third problem was the lack of preparedness of individuals involved in the process. Stuart believes that the negotiations "would have had a much better result had [the parties] taken the time initially to educate all of us [negotiators and the communities] in an interest-based negotiations process."[513] This education is necessary because

> It's a lot...harder to negotiate in an interest-based negotiation than it is an adversarial way. In an adversarial way you can say "That's my position and stuff it." You don't have to do the homework.[514]

He arranged for experts in the principled negotiations process to visit the Yukon to show negotiators how the process works. After that everyone said they were on-board. But, as he put it, "they couldn't walk the walk."

> Within six months it became quite obvious that the old habits were taking over. The first time we ran into a crisis the process wasn't well enough established to be able to rule a solution of that crisis and people went back to old habits and continued to do that throughout the entire process.[515]

One example of where this lack of familiarity with principled negotiations caused a problem had to do with a suggestion by territorial negotiators to bring in a mediator at one point to smooth things over. Those federal negotiators without serious, high level, multi-party negotiating experience saw the inclusion of mediators as a sign of failure. But according to Stuart experienced negotiators know that the disinterested perspective of a mediator is one tool that can be used to move negotiations along. By meeting separately with each party a mediator can get positions and interests out of all parties that they would not share at the table and "can get a sense of where the deal is." In this way a mediator "can work the parties towards...recognizing that if they move...based on their interests, they can construct a deal that is better than a compromise which might be halfway between...their positions.[516]

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[512] Barry Stuart, August 17, 1993.

[513] Barry Stuart, August 17, 1993.

[514] Barry Stuart, August 17, 1993.

[515] Barry Stuart, August 17, 1993.

One of the features of the principled negotiations process was that the parties divided their negotiating teams into numerous small "working groups", each assigned to deal with a specific issue. This allowed for more issues to be dealt with simultaneously and also raised the probability that progress would be made somewhere. This progress can provide momentum for the whole process. In Stuart's view it is in these "working groups...where the interest-based negotiation worked most effectively" in the Yukon.[517]

Unfortunately the federal government's Ottawa officials had a penchant for focusing on big meetings: "[G]et everybody in one room...and we'll negotiate this thing." This, however, is counter productive as "people don't go to big meetings to listen, they go to big meetings to talk and usually to lecture and usually to put somebody else down."[518]

One problem the negotiators could not avoid had to do with what happens once the parties articulate their interests. The literature on the principled negotiations approach says that negotiators should avoid adopting "bottom lines"; that they should evaluate proposals using "objective criteria"; and focus on "mutual gain options."[519] This was not always possible.

Tim McTiernan acknowledged that "[t]rue interest based negotiations have no bottom line." However all parties have bottom lines when negotiating issues like aboriginal self-government. With regard to self-government "the bottom line for the federal government" is that arrangements must be negotiated "within the current constitutional framework."[520]

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[516] Barry Stuart, August 17, 1993.

[517] Barry Stuart, August 17, 1993.

[518] Barry Stuart, August 17, 1993.

[519] See Fisher, Ury and Patton.

Tim Keopke agreed that there has to be a bottom line. The federal government sees itself as giving up the land and the money and is not "going to send [negotiators] out with a blank cheque." Each party has a bottom line in terms of what it can do, can afford, or will accept. This problem is compounded by the fact that the bottom line can not be determined by analytical means.[521]

Despite these problems Stuart believes that the parties did get a long way towards instituting a principled negotiations process. There was enough trust among negotiators, enough "infrastructure in the process" that problems could be dealt with.[522]

This assessment once again points to the necessity of a resilient process. A process which resolves problems and builds trust can deal with whatever conflict might emerge from negotiated agreements. And "[i]f you process conflict properly it is a relationship builder, not a destroyer." Resolving land claims "can be a real relationship builder" but not if the parties employ an adversarial process where people don't feel good about the agreement that is reached; where they feel they "smoked" the other side on some points but were "smoked" on others; and where they would prefer to renegotiate.

> Where is that going to take anybody that wants to live in the same community forever together ?[523]

Principled negotiations had a similar effect on rights discourse from a procedural perspective, as the focus on pragmatic issues had from a substantive perspective. Individually, and in combination, they served to reduce the effect that rights discourse had on the outcome of the UFA negotiations. Once again the focus was on finding an arrangement that the parties could live with rather than trying to realize a philosophical position. The process aided and abetted the substantive focus in that not only were pragmatic issues emphasized but the parties were induced to accommodate and compromise. The negotiations process provided the framework in which accommodation and compromise took place.

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[520] Tim McTiernan, July 27, 1993.

[521] Tim Keopke, August 23, 1993.

[522] Barry Stuart, August 17, 1993.

[523] Barry Stuart, August 17, 1993.

It would be a mistake, however, to believe that each side compromised equally or that the negotiating environment was determined by equal input from all three parties. The following section will illustrate that the political power of the three parties to the negotiation was unequal and that the negotiating environment was set, to a great degree, by the federal government.

The Imbalance of Political Power.

The factor which had the greatest effect on the outcome of the UFA negotiations was the relative political power of the parties to the negotiation. In the case of the UFA negotiations the Government of Canada was by far the most powerful party.

Tim McTiernan pointed out that power manifests itself in different ways. One way is as legal and political authority and responsibility which the federal government possessed "in spades."[534] As explained above the territorial government is in a subordinate legal and political position to the federal government. As for YFNs they were seeking to establish legal and political authority and responsibility based on their legal, moral, and inherent rights. Given these legal and political relationships it was federal policy which set the context for negotiations.

Power also manifests itself in terms of resources for negotiations. As a territorial negotiator McTiernan

> understand[s] that in very raw terms where you're sitting as the lone representative of your government's interests in front of 25 federal officials drawn from several different departments, perhaps with the weight of the justice department thrown in to help. And First Nations feel that even more strongly when they see both the territorial and the federal government arrayed at the table.[525]

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[534] Tim McTiernan, July 27, 1993.

[525] Tim McTiernan, July 27, 1993.

Even after it attained separate status at the negotiating table the Government of the Yukon was still limited. Though its position had been strengthened by the formation of the Land Claims Secretariat in the mid 1970s it still lacked the money, expertise, and personnel available to the Government of Canada.

Victor Mitander said that "[e]ven with the resources [YFNs] did have [$60 million in loans so far] we didn't have the resources government had, by far." The tripartite nature of negotiations made it look like there was a "level playing field" but that was not the case.[526]

Mitander added that the Government of Canada will only negotiate where it can control the process. The federal government always has the choice of not negotiating with an aboriginal nation. This is possible because there are so many claims to be negotiated. If one aboriginal nation will not accept the federal government's conditions it will find one that will. Litigation is always an option. But while this may resolve some questions ultimately the parties have to head back to the negotiating table.[527]

Tim Keopke acknowledged that the "federal government does hold most of the cards." He realizes that this may be unfair but can not see how negotiations could be conducted otherwise. This was not a situation which could be altered for the negotiations in the Yukon. Federal control is necessary because the federal government has a broader set of obligations to consider.[528]

Given the preponderance of federal power in terms of authority, responsibility and resources, federal control of the negotiations process is not so much a factor in negotiations as it is a condition of negotiations.

We have already seen two important issues where federal power determined the outcome of negotiations: the lack of constitutional protection for self-government provisions and the lack of explicit recognition of aboriginal title in the UFA.

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[526] Victor Mitander, September 1, 1993.

[527] Victor Mitander, September 1, 1993.

[528] Tim Keopke, July 27, 1993.

YFNs want their self-government agreements protected by the constitution. Dave Keenan described constitutional protection as "a definite need."[529] Each YFN self-government agreement contains a clause which states that the agreement can't be changed except with the consent of the parties involved. Why does this not give YFNs enough protection ? Keenan's answer: "Look at history."[530]

Keenan points to a lack of trust between YFNs and government. This lack of trust is rooted in past actions where governments acted against the interests of YFNs. But it is also a continuing problem because federal civil servants take the current agreements and, in Keenan's view, interpret them and try to apply them in a manner inconsistent with the spirit of the agreements. The existing level of protection, says Keenan, is "as strong as we could get it." However no protection, short of constitutional protection, will ever be enough.[531]

Given the lack of trust YFNs have for government, and the fact that the current level of protection is viewed as inadequate, one might wonder why YFNs accepted the agreements. Keenan's answer is testimony to the control that the federal government holds over the negotiations process:

> If we were waiting for the constitutional protection, where would we be ? We wouldn't be anywhere.[532]

YFNs did better with aboriginal title. Aboriginal title, like the inherent right to self-government, is not explicitly recognized by the UFA. However negotiators in the Yukon were able to devise a regime of title that is unique for YFNs. In many ways this is a substantial accomplishment. However the fact that innovative means of securing tenure and control were needed also raises the issue of federal control. When all was said and done the federal government could turn down YFN demands for a certain quantum of land or form of title.

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[529] Dave Keenan, August 5, 1993.

[530] Dave Keenan, August 5, 1993.

[531] Dave Keenan, August 5, 1993.

[532] Dave Keenan, August 5, 1993.

The Government of Canada's control over land was also exhibited by its policy of land allocation during the negotiations. Land allocation was an issue from the time that negotiations began. The problem was that while YFNs were negotiating control over certain lands other federal government departments or other parts of DIAND were allocating the same lands to third parties.

This was not merely an issue between YFNs and the federal government. The Yukon Government wanted land allocations to continue so that the territory's economy would not stagnate while claims were being negotiated. This was problematic for YFNs because any lands that YFNs would retain would be subject to existing interests.

Eventually a process of "interim protection" was put in place. This would protect certain lands from being allocated while those lands were subject to negotiations. The primary problem with this process was that applications for interim protection had to go to the federal cabinet. As a result the process was time consuming, it could take two months to get a piece of land protected. In that period lands that YFNs were seeking to protect could be allocated to a third party.[533]

Tim Keopke said that he is "the first one to admit that it's really unfair for the Indian people to be forced into a negotiation where [the federal government is] busy giving it out through the back door while [negotiators are] negotiating it through the front door." Other elements of the federal government did not keep the negotiators informed of their land allocations so neither the federal negotiators nor CYI negotiators knew which parcels of land were being allocated. The only mechanism negotiators had against this possibility was to select lands for protection during the winter when other activities slowed down.[534]

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[533] Tim Keopke, July 27, 1993.

[534] Tim Keopke, July 27, 1993.

YFNs always contended that the allocation of land under negotiation was a breach of trust and compromised First Nations interests.[535] When negotiations first began the CYI wanted a "land freeze." This idea was rejected by both the federal government and the territorial government.

YFNs accepted the idea of interim protection but they had little choice. They believed that once a negotiator made a commitment regarding a parcel of land that land should be protected immediately. They also wanted to be involved in the process of allocating lands to third parties.[536] However the land allocation process remained under federal control.

In Chapter Three we saw how Whittington identified three major components of a comprehensive claim: land, political rights, and financial compensation. The discussion of the constitutional protection of self-government agreements, aboriginal title, and land allocation shows how the federal government was able to exercise control over land and political rights. A discussion of the requirement that YFNs pay back money they borrowed to negotiate their claim, and the provisions for implementation funding show that the federal government maintained control over the purse strings as well.

The CYI may have had a strong argument in 1973 but it had little money to research and negotiate a claim. In order to negotiate the CYI had to borrow money from the federal government. The final total, already over $60 million, is to be deducted from the compensation package. Such a condition put tremendous pressure on YFNs since they had to gauge the relative benefits of continuing negotiations against the certainty of reduced compensation.

Yukon Indians have always contended that the pay-back provision was unfair. They argue that since it was the federal government which violated their rights the federal government should assume all costs of negotiation. As Dave Keenan put it

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[535] Victor Mitander, September 1, 1993.

[536] Victor Mitander, September 1, 1993.

> We have to borrow $60 million against our compensation to pay for their fiduciary obligation. Does that make sense ? Not to me it doesn't.[537]

Victor Mitander offered two other reasons why YFNs should not have to repay these loans, at least not in total. First, YFNs are not responsible for the duration of negotiations. Second, the UFA set precedents which federal negotiators and aboriginal nations will be able to use. This should reduce the cost of future negotiations.[538] YFNs believe they should be given some credit for having blazed the trail.

As a general policy the federal government argues that without the repayment requirement negotiations would become even more costly and protracted than they are because aboriginal nations will delay until they get the agreement they want. With regard to the Yukon negotiations the federal government has argued that the financial compensation package has a built-in allowance for loan repayment.[539]

Tim Keopke admits that this argument is a hard sell. The federal government could not determine in advance what the cost of negotiations would be because they didn't know how long negotiations would last. He also acknowledges that for YFNs it is not simply a money issue. For the federal government to assume the costs of negotiations would be an acknowledgement that YFN rights were violated. Keopke believes that the parties will never see eye-to-eye on the issue although his personal assessment is that "they [CYI] have an argument."[540]

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[537] Dave Keenan, August 5, 1993.

[538] YFNs have already been contacted by aboriginal peoples the NWT, Quebec and BC. Victor Mitander, September 1, 1993.

[539] Tim Keopke, April 10, 1994.

[540] Tim Keopke, April 10, 1994.

The federal government's position ignores the delays it has caused.[541] Negotiations slowed down every time a federal election was called, especially if the election resulted in a change of government. Delays would also ensue whenever a new Minister of Indian Affairs was appointed.[542] As Paul Birckel recalled, "every time those things changed we had to wait but in the meantime we had to keep using our borrowed money."[543]

One example of delays at the federal level is what happened to the UFA and the four sets of final and self-government agreements which were signed on May 29, 1993. Soon after the signing the governing Progressive Conservatives held a leadership convention which resulted in Kim Campbell's ascendency to the Prime Ministership. She then appointed a new Minister of Indian Affairs, Pauline Browes. This was followed by a general election which resulted in a change of government. The new Prime Minster, Jean Chrétien, appointed a new Minister of Indian Affairs, Ron Irwin. Once the situation at the federal level was stabilized the enabling legislation for the Yukon agreements had to get on the order paper. The legislation was dealt with by the House of Commons and the Senate in the summer of 1994 and was finally proclaimed on February 14, 1995. In all twenty-one months had elapsed between the time the agreements were signed and when they could begin to be implemented.

Delays of this kind were of concern to the territorial government as well. Immediately after the NDP took office the federal government decided to re-evaluate its comprehensive claims policy in light of the Coolican Report. This was "admirable" but essentially produced a year's delay in the negotiations. This was frustrating for the NDP government since it had just appointed Stuart as chief negotiator and was ready to negotiate.[544]

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[541] Not all delays were caused by the federal government. The Yukon Government had to go through its electoral processes as well. The territorial government also abandoned the negotiations from January to May 1983 over its demands over land and constitutional development (Smyth pp.123-137). The CYI refused to negotiate during the "Oka Crisis."

[542] Between the start of negotiations in 1973 and the proclamation of the UFA and the first four sets of final agreements and self-government agreements there were six general federal elections (1974, 1979, 1980, 1984, 1988 and 1993); four changes of government (1979, 1980, 1984 and 1993) and 13 ministers of Indian Affairs. (The list of ministers includes: Jean Chrétien, Judd Buchanan, Warren Allmand, Hugh Faulkner, Jake Epp, John Munro, Doug Frith, David Crombie, Bill McKnight, Pierre Cadieux, Tom Siddon, Pauline Browes, and Ron Irwin.)

[543] Paul Birckel, August 31, 1993.

Barry Stuart raises a rather ominous consideration. In his view one reason negotiations take so long is that "[i]t's more politically advantageous [and cheaper] for the federal government to negotiate than it is to settle." The federal government can reassure those who support the process by negotiating, and can fend off those who oppose the process by continuing to negotiate, rather than finalizing and implementing agreements.[545]

To Dave Keenan the fact that YFNs negotiated under these conditions shows the extent to which they were "willing to go to achieve what [they] want[ed]."[546] But what choice did they have ? If they refused the federal government's condition of loan repayment they would have never made it to the negotiating table.

When one considers the fact that the federal government violated YFN rights, that YFN agreements have established precedents which should make it easier to negotiate elsewhere, and that the federal government is at least as responsible for delays as the other parties, the federal policy on loan repayment is, in principle, indefensible. This is also true with regard to incentives. The federal government's position implies that YFNs need an incentive to conclude agreements. Yet the aspirations of YFN communities and Yukon Indians' resolve to achieve those aspirations are incentive enough. Furthermore one could argue that it is in the federal government's interest to delay. To tie Barry Stuart's observation to the original point, every day that negotiations continue reduces the compensation that the Government of Canada will ultimately have to transfer to YFNs.

Of course the government's policy is not based on principle but fiscal reality. The cost of resolving aboriginal claims has been, and will continue to be, great. Still it is unfortunate that the federal government has decided to shift a great part of this burden onto aboriginal peoples, considering the fact that it is they who were wronged in the first place.

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[544] Tony Penikett, July 28, 1993.

[545] Barry Stuart, August 17, 1993.

[546] Dave Keenan, August 5, 1993.

Another financial aspect of the UFA negotiations is the funding allocated to implement the agreements. No interviewee who was involved in the UFA negotiations stated that the amount of implementation funding was adequate.

Paul Birckel believes that the amount of funding allocated to the Champagne-Aishihik First Nations is "about a quarter of what's actually needed...to be able to build our people up to a point where they can have a fulfilled life." But, he says, "we had to settle somewhere."[547] Dave Keenan said that the TTC

> accepted the money that's in the agreements. [We] said that we could live with the money that's in the agreements. But no, there is not enough money in the agreements.[548]

In fact the amount of money the TTC will receive for implementation will be less, on a yearly basis, than it currently receives from DIAND.[549]

One reason YFNs accepted these agreements was because they were able to negotiate formula financing agreements, "something that's never happened before" for an aboriginal government. Keenan worked on this issue with Robert Hager, Chief of the First Nation of Nacho Nyak Dun. The federal government had offered YFNs a contribution agreement but YFNs "wanted a formula that [they] could live with that would be derived from actual everyday living. That's what we put into place." YFNs will have access to other federal government program funding, though they will have to submit proposals for this funding. This is something the TTC is prepared to do. The Teslin Tlingit are confident that they can address the problems in their community with fewer resources than governments have had in the past. In order to do so they will have to be

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[547] Paul Birckel, August 31, 1993.

[548] Dave Keenan, August 5, 1993.

[549] Dave Keenan, August 5, 1993.

> a little keener...a little tighter...a little more well-oiled. And if anything that's what I'm going to prove to the government of Canada and the government of the Yukon along the way, that we're a well-oiled...efficient machine [who can] do it ourselves.[550]

In order to understand why implementation will be underfunded we must understand how the implementation allocation was arrived at. This process once again indicates the degree of control which the federal government is able to exert over the negotiations process.

The original estimate for implementation funding was arrived at in the wake of the 1988 AIP. However by the time the UFA was finalized it contained provisions which were not included in the AIP. None of the negotiators believed that there was unlimited funding for implementation but the federal government never indicated that certain issues, or a certain number of issues, could not be negotiated because there would not be the funding to implement them. In the fall of 1992 the parties began a process to re-estimate implementation costs. Halfway through this process the federal government announced that there was a set amount of money for implementation "take it or leave it." This figure turned out to be the one approved by the Treasury Board in 1988.[551]

Each agreement will be reviewed five years after its initial implementation but no one believes the federal government will increase implementation funding at that time.[552] In Victor Mitander's view the federal government's approach to implementation funding "makes a farce of land claims." It not only breeds mistrust between YFNs and the federal government but also generates opposition to the agreements in YFN communities.[553]

YFNs are hoping that the Government of the Yukon will contribute funds to implementation. The territorial government's policy is that it will do what it can to ensure it meets its obligations. However it will only contribute those funds which it receives from the federal government for that purpose. The territorial government will not divert funds from other areas to implement the land claim because the resolution and implementation of aboriginal claims is a federal responsibility. In view of its limited funding the territorial government, like YFNs, is trying to develop more cost-effective ways of implementing the agreements.[554]

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[550] Dave Keenan, August 5, 1993.

[551] Karyn Armour, August 10, 1993.

[552] Karyn Armour, August 10, 1993.

[553] Victor Mitander, September 1, 1993.

This position indicates the primary interest the Government of the Yukon had with regard to implementation funding: that the financing of YFN governments not be at the expense of the territorial government. Former Yukon chief negotiator Doug McArthur was largely responsible for articulating certain principles regarding financing which were agreed to. The ceiling was that YFNs would "have funding to implement self-government agreements sufficient to achieve...equitable conditions with the...general population of the territory." The floor was that "the territorial government shall not be cut back by the federal government in a way that [would] lower the general standards." In Tony Penikett's view "[t]o the extent we could get any principles those were good principles." The fact that YFNs were able to negotiate formula financing agreements was also of some comfort to the territorial government.[555]

In Penikett's view "the really chilling fact" is that even after the parties have engaged in protracted negotiations to reach agreements

> the power of a senior government to actually starve [those agreements] of resources...is still quite obvious and there's no protection whatsoever against that...[I]n spite of all the rhetoric about self-government...land claims...[and] a new assertive territorial government the bottom line in terms of...fiscal federalism is both [the territorial government and YFN governments] are still dependent on the federal treasury. And that may be, in the end, the real weakness in these agreements. I don't know anybody else that's solved that problem. I don't know what the answer is but that is the area of vulnerability, that's the Achilles heel of these agreements. And given the history of broken treaties and betrayals of promises in this country that should continue to be a source of concern.[556]

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[554] Karyn Armour, August 10, 1993.

[555] Tony Penikett, July 28, 1993.

[556] Tony Penikett, July 28, 1993.

The pragmatic focus of negotiations raises the level of concern regarding the apparent inadequacy of implementation funding. It leaves open the possibility that conflict will ensue at some point in the future should YFNs feel they have been taken advantage of by the federal government, in the sense that the federal government agreed to certain self-government provisions and then deliberately underfunded them. Whether this would lead to co-operation or competition between the territorial government and YFN governments remains to be seen.

Given the dominance of the federal government in the land claims negotiations process the end result, both in terms of the substance of agreements and the time it takes to reach agreements, would be determined, to a large extent by the manner in which the federal government conducted negotiations. In the view of territorial and YFN representatives the federal government did not provide the leadership necessary to produce a timely conclusion to negotiations. This was due to the federal mandate, both in terms of its substance and the way in which it was pursued.

Generally speaking the territorial government and YFNs considered the federal mandate to be inconsistent or non-existent. Tony Penikett sensed that the federal mandate "was a blank sheet...when it came to...practical arrangements around self-government or even land claims..." There were many areas where federal negotiators did not appear to have clear direction. As a result negotiators had to work out practical arrangements on their own: "[T]hat was possible...because there wasn't any clear instruction."[557]

This could have been an advantage had the parties had a free hand to craft a "made in the Yukon" agreement, but they did not. The problem was not with the federal government's negotiator in the Yukon but with the fact that some of his decisions were overridden.[558] Every agreement had to be approved by decision-makers in Ottawa. Often someone in some federal government department would raise an objection - sometimes months after the fact. This, says Penikett was a real difficulty in the process.[559]

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[557] Tony Penikett, July 28, 1993.

[558] Shakir Alwarid, July 30, 1993.

Barry Stuart was surprised by the lack of coordination at the federal level. The parties had been negotiating for 13 years by the time he got involved and he assumed there was a system in place that would both coordinate the competing interests in the different departments that were involved in the negotiations, and anticipate the policy changes that would be needed. This was not the case.[560]

This lack of coordination was compounded by the federal government's reliance on precedent and established policy. The federal government's belief in one policy to accommodate aboriginal peoples across Canada is "naive." It prevents negotiators from reaching solutions that the federal government believes could be problematic in another area of Canada.[561] In Stuart's view the federal government can not

> negotiate a land claims settlement in any community, and particularly in the North, within existing policy. Those existing policies have been designed to perpetuate the Department of Indian and Northern Affairs.[562]

Established policy is a non-starter, therefore, because the purpose of negotiations, as far as aboriginal peoples are concerned, is to eliminate DIAND from their lives.

In Stuart's view the lack of coordination and reliance on precedent which he observed in 1985 indicated a lack of willingness, on the part of the federal government, to settle aboriginal claims. This lack of willingness was also exhibited by the federal government's habit of giving priority to land claims in fits and starts. He believes that some ministers of Indian Affairs wanted to conclude agreements. However it is difficult for ministers to overcome bureaucratic resistance in the short terms they have in their positions.[563]

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[559] Tony Penikett, July 28, 1993.

[560] Barry Stuart, August 17, 1993.

[561] Barry Stuart, August 17, 1993.

[562] Barry Stuart, August 17, 1993.

Victor Mitander also mentioned the involvement of civil servants as a shortcoming in the federal government's approach to land claims negotiations. In his view the sooner the federal government gets "away from using bureaucrats in the negotiating process the sooner they're going to make progress." Civil servants are too much a part of the entrenched hierarchy, and too involved in looking after themselves and the federal government's interests to "determine what's best for us." Civil servants are not in a position to make the kinds of decisions that need to be made in order to resolve aboriginal claims. As a result they rely on precedent, an approach which is incompatible with the principled negotiations process. "They don't care...what our interests are", said Mitander.[564]

Stuart concurs with Mitander's views on the role of civil servants in the resolution of land claims. Settling claims requires "[c]ontinued, high priority, focused [negotiations] on the issues and you have to have the politicians directly involved because the decisions cannot be made by bureaucrats." These decisions go beyond a bureaucratic mandate.[565]

Improving the position of the federal chief negotiator is, in Mitander's view, the key to making future negotiations quicker and less costly. He believes the federal government, and provincial governments for that matter, must entrust negotiations to an impartial person who understands aboriginal issues, and the importance of these issues to aboriginal peoples. He or she should be given "a flexible mandate to negotiate all elements in relation to that claim." The federal negotiator should have access not only to the DIAND minister but to the entire Cabinet because the negotiator is a representative of Canada not DIAND.[566]

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[563] Barry Stuart, August 17, 1993.

[564] Victor Mitander, September 1, 1993.

[565] Barry Stuart, August 17, 1993.

[566] Victor Mitander, September 1, 1993.

Giving the chief negotiator the mandate Mitander outlines would indicate a greater political will to settle aboriginal claims. Giving the chief negotiator access to Cabinet could increase the level of interdepartmental cooperation needed to craft an agreement.

In defending the Government of Canada's approach to the UFA negotiations Tim Keopke agreed that if his mandate had been produced locally it would have been easier to live with and easier to change. He points out, however, that the federal government must consider the broader public interest in everything it does, including resolving aboriginal claims.[567] He concedes that federal policies do not always make sense for the Yukon but the government of Canada has numerous claims to negotiate. YFNs, and the Government of the Yukon, only have to deal with this one set of claims.[568] Some potential solutions can not be tried because of the impact they may have elsewhere.[569]

He acknowledges that there is a lack of an understanding of the Yukon in the federal bureaucracy. Some ideas are rejected simply because people in Ottawa do not understand the context of negotiations in the Yukon. In the end the people in Ottawa "are getting a product they can live with."[570]

Federal policy is based, in part, on the idea of parity. The federal government wants to ensure that there is parity between the agreements YFNs sign and those of other aboriginal peoples across Canada. There must also be parity between the various agreements in the Yukon. There is no "precise equation" in establishing this parity. The mix of elements in each agreement - land, political rights, compensation, economic opportunities - will be different but they must balance out.[571]

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[567] Neither Keopke nor Mike Whittington, who was the chief negotiator for the CYI claim based in Ottawa from 1987-1992, are employees of the federal government. They were both contracted to negotiate the claim.

[568] Tim Keopke, July 27, 1993.

[569] Tim Keopke, August 23, 1993.

[570] Tim Keopke, August 23, 1993.

[571] Tim Keopke, July 27, 1993.

The same applies to the question of the constitutional protection of self-government agreements. For YFNs and the Government of the Yukon this was not an issue, they both agreed that YFN self-government agreements should be considered protected by section 35(1) of the *Constitution Act, 1982*. However if the federal government had agreed to this provision it would have put YFNs in an advantaged position compared to aboriginal peoples elsewhere in Canada. Federal policy was that self-government agreements would receive constitutional protection once general agreement on the issue had been reached between the federal government and the provincial governments.[572]

The federal government wants to establish precedents it can live with. However the decision-makers in Ottawa can be convinced to accept precedents that are so unique that they can be defended.[573] Keopke points out that the federal government is not the only party that relies on precedent.

Aboriginal groups refer to previous agreements in putting together their initial negotiating position. As Victor Mitander pointed out aboriginal groups from across Canada have contacted the CYI regarding the UFA and other agreements signed in the Yukon. The CYI was also aware of previous agreements when it began the UFA negotiations in 1985. YFNs also use the argument that they are establishing precedent as one reason why the loans they owe the federal government should be reduced or forgiven.

In putting together their initial negotiation position aboriginal groups will cite agreements where the per capita allocation of money and land is greatest, or refer to agreements that contain the broadest range of political rights. Keopke acknowledges that aboriginal peoples "want to start off somewhere." However the principled negotiations process "tends to erode" those kinds of demands if they prove to be "inconsistent with protecting one's reasonable interests" and/or incompatible with the interests of the other parties to the negotiations.[574]

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[572] Tim Keopke, July 27, 1993. Of course the situation is somewhat more complicated now, given the federal government's inherent right policy statement of August 1995. This will be discussed in Chapter Six.

[573] Tim Keopke, August 23, 1993.

Keopke's defence of federal policy and the use of precedent does not mean that federal negotiators in the Yukon merely applied federal policy in some mechanistic fashion. They did their part in convincing those in Ottawa to accept "made in the Yukon" solutions. The compromise on aboriginal title is one example of that. This effort was recognized by YFNs.[575] However as Tim McTiernan points out negotiators have to understand their mandate. A negotiator who delivers an agreement that is acceptable to the other parties, but not to the one he or she represents, has not done the job assigned to them.[576] Federal negotiators knew the value of "made in the Yukon" solution but ultimately had to represent the federal interest in the UFA negotiations.

Conclusion.

Rights discourse was not the only factor that helped establish the context in which the UFA negotiations took place. This chapter examined five other factors which established the negotiating environment. These were the negotiating position of the CYI, events at the national level that affected federal government policy, the changing position of the Yukon Government, the principled negotiations process, and the imbalance of power among the parties to the negotiations.

For the purposes of this thesis it is worth noting the effect that each of these factors had on the effect that rights discourse had on the outcome of the UFA negotiations. Some of these factors tended to accentuate rights discourse while others diluted the effect that rights discourse had. Some factors did both.

Such is the case with the negotiating position taken by the CYI. One the one hand it emphasized rights discourse because the claims of YFNs were, in part, based on aboriginal rights. The rights component, particularly the characteristics of inherent aboriginal rights, became more prominent over time. On the other hand the demands of YFNs focused on practical considerations. This, combined with the CYI's participation in the principled negotiations process, served to move the discussion away from rights toward achieving practical solutions.

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[574] Tim Keopke, August 23, 1993.

[575] Dave Keenan, August 5, 1993.

[576] Tim McTiernan, July 27, 1993.

Events at the national level enhanced the role of rights discourse. Supreme Court of Canada decisions; the reports submitted by Berger, Penner, and Coolican; and constitutional discussions all served to legitimize the rights claims of aboriginal peoples, and the aboriginal leadership at the forefront of the aboriginal claims debate.

The position of the Government of the Yukon also gave prominence to rights discourse, in the sense that the territorial government, after 1985, was willing to recognize aboriginal rights and agreed that the agreements reached in the Yukon should be vehicles for continuing, not extinguishing, those rights. However once again the territorial government's goals in negotiations were practical so there was no insistence that the outcome of negotiations reflect aboriginal rights in any particular manner.

As mentioned above the principled negotiations process limited the effect that rights discourse would have on the outcome of negotiations. Although this process was designed to generate respect for the rights claims of the other parties the focus was on negotiable interests. Furthermore the process of negotiations was designed to find compatibility among the interests of all three parties.

While it would be difficult to strictly rank the above factors, and rights discourse, in terms of their effect on the outcome of the UFA negotiations it is clear that the imbalance of power among the parties, which favoured the Government of Canada, was the most important factor. It also strictly circumscribed the effect that rights discourse could have on the outcome of those negotiations. This is not to say that the power of the federal government set the entire context for negotiations. These other factors did have an effect.

But control ultimately rested with the federal government. The constitutional status of the Government of the Yukon is such that, whatever the political realities, if push came to shove an agreement could be reached without the territorial government's consent.

Similarly if YFNs balked at the conditions which the federal government laid out for negotiations - such as the loan pay back requirement - there would have been no agreement at all.

Chapter Six

Conclusions

Summary.

The discourse of inherent aboriginal rights arguments has played a prominent role in the aboriginal rights discussion in Canada. My goal in this thesis was to uncover the link between the philosophical and political arguments associated with the discourse of inherent aboriginal rights, and the outcome of a comprehensive claims negotiation. This would reveal the utility of employing this approach in negotiations as well as expand our understanding of both the inherent rights discourse and the negotiation of aboriginal claims.

In order to do so I articulated a concept of inherent rights, based on the arguments put forward by its many proponents. Then I tried to determine the effect that inherent aboriginal rights discourse had on negotiations by using the Council for Yukon Indians' Umbrella Final Agreement as a case study.

The analysis of the literature on inherent rights revealed the following characteristics: Inherent aboriginal rights are said to be of divine origin. They were given to aboriginal peoples when they were placed in North America by the Creator. This belief establishes, for aboriginal peoples, a strong spiritual attachment to the land. This historical priority also serves as the basis for aboriginal claims to title to the land.

Aboriginal title is the source of a general right of self-determination. This general right of self-determination is a collective right. This means, first, that individual aboriginal rights are dependent on membership in an aboriginal community and, second, that the only means of modifying those rights is by the collective consent of the community.

Aboriginal title and the right of self-determination are in turn the source of a comprehensive list of specific rights, such as harvesting rights. These rights entail responsibilities, essentially to preserve the land for future generations.

In these ways inherent rights accord to aboriginal peoples special rights and status when they incorporate themselves into nation-states. Most importantly because these rights are founded in original occupation they are not dependent on the legal concepts of settler states for their legitimacy.

I critiqued this approach, stating that spiritual and culturally specific aspects of the inherent rights claims were unverifiable or unhelpful, and in any case unnecessary. In my view a strong claim of inherent rights could be made based on historical priority and the rights associated with maintaining an established social order.

This discussion also raised questions as to the utility of dealing with aboriginal claims in terms of rights. It may be argued that aboriginal claims to land, for example, are inconsistent with other claims made by aboriginal peoples - i.e. that land cannot be owned. The James Bay Cree, for example, have traditionally operated under a system where "[t]he central resources of land and wildlife are not considered to be owned because people are born and die while the land continues."[577] Instead authority over the land is exercised by stewards who govern "in the name of the community and the common interest".[578]

Yet the whole question is, in my view, moot. The means of regulation employed by aboriginal societies served the same basic purpose as rights in European political systems, to create some semblance of order within and between societies. Furthermore aboriginal peoples had to employ rights discourse to safeguard their interests. It is the *lingua franca* of the political and legal systems that oppose them. Nonetheless one does not have to contort the rights concepts which underlie the Canadian legal and political system in order to construct a concept of inherent aboriginal rights.

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[577] Feit, p. 182.

[578] Feit, p. 184.

The essential question in this thesis was whether or not the agreements concluded in the Yukon could be said to recognize the rights of Yukon Indians as inherent rights. Nowhere in the UFA does government recognize aboriginal rights as inherent. A literal reading of the UFA, then, would lead one to conclude that the source of the rights to be exercised is not an entitlement based on original occupation but rather the enabling legislation enacted within the Canadian legal system.

As far as the system of land tenure is concerned the UFA also avoids the recognition of aboriginal title because this concept is not currently recognized in Canadian law. Instead lands retained by YFNs have a special designation and are referred to, in the UFA, as being held in "Equivalent to Fee Simple" rather than "Fee Simple."

In addition to this interpretation of land tenure the UFA provides for the exercise of a number of collective rights separately from other Canadians. To this extent it may be said that the UFA recognizes Yukon Indians as having special status. The continuing right of access to Crown Land, for example, acknowledges traditional use by YFNs. YFN land and title may be alienated but the process of alienation involves the consent of the YFN involved.

The financial provisions of the UFA stipulate that compensation be paid to YFNs. The compensation principle, however, is found in the common law so it does not, in and of itself, constitute a recognition of inherent rights. Furthermore the economic development provisions are designed to place Yukon Indians on a level playing field with other Yukoners.

As for the self-government provisions, YFNs governments will be constituted under special federal and territorial legislation and will not be creatures of the *Indian Act* or the Yukon's Municipal Ordinance. The federal government refused to give the self-government agreements constitutional protection under Section 35 of the *Constitution Act, 1982*. However it was agreed that such protection could be extended should agreement be reached at the national level.

This analysis raises certain questions regarding the role that aboriginal rights arguments, particularly inherent rights arguments, played in the outcome of the UFA negotiations. Here it was determined that the effect of rights discourse was indirect, contributing more to the context in which negotiations took place than the substance of the provisions of the UFA. Inherent aboriginal rights discourse did influence the position which the CYI brought to the table. Legal decisions regarding the nature and scope of aboriginal rights also affected the negotiating position of the Government of Canada. However ultimately negotiators had to find agreements which were "practical, workable, and acceptable" to the three parties to the negotiations and the people they represented.

Other factors contributed significantly to the context in which negotiations took place. Five of these were discussed in Chapter Five. The first to be explored was the negotiating position of the CYI. The CYI never advocated a radically inherent rights approach. That is, YFNs always insisted their rights were inherent as an historical fact and as a matter of principle, but they also recognized that in practice agreements had to be negotiated within the context of Canadian federalism. In fact the initial position of Yukon Indians, as articulated in *Together Today For Our Children Tomorrow*, saw agreements being negotiated within the political structures and concepts of land tenure that existed at the time.

The second factor was events at the national level which contributed to changes in federal policy over the course of negotiations. Federal policy was affected by various events including constitutional negotiations, FMCs on aboriginal issues, court cases, and the Berger, Penner, and Coolican reports. These would eventually lead to the further articulation of the inherent rights approach. The CYI's position was partially influenced by this and as a result its philosophical position moved closer to the inherent rights end of the inherent rights-contingent rights continuum.

The third factor was the changing position of the Government of the Yukon. From 1973-1984 territorial policy was predicated upon a position which was either hostile to aboriginal claims or sought to place competing claims (to the constitutional development of, and greater powers for, the territorial government) ahead of aboriginal claims. The 1985 territorial election brought to power a party (the NDP) that instituted a new negotiations process and saw compatibility between its claims and those of the CYI.

The fourth factor is the process by which the UFA was negotiated. Negotiations from 1973-1984 were conducted in an adversarial fashion. The parties viewed the negotiations as a zero sum game and therefore focused their energies on ensuring that as many of their positions as possible were incorporated into the final agreement. Negotiations were conducted out of the public eye, and largely out of the Yukon. This process ultimately produced an agreement in principle which was rejected by YFNs in 1984. The reasons for this rejection focused partially on the substance of the agreement: not enough land would be retained by YFNs; provisions for self-government were considered inadequate; and the federal government's insistence on the extinguishment of aboriginal title remained unacceptable. However rejection was also blamed on the process itself. No one seemed to be satisfied with the secretive nature of the negotiations.

By the time negotiations resumed in 1987 the parties had agreed to adopt a different process, a *principled* negotiations process. This process tried to move the parties away from seeing negotiations as a zero sum game. The parties were to focus on concrete benefits, rather than philosophical, political, or legal positions, and were to articulate negotiable interests. Another change was that negotiations were conducted in the Yukon to a greater extent. This geographic change also allowed for more input from more people: Yukon Indians, third party interests, and other Yukoners. Some Yukoners might still dislike the idea of claims negotiations but it was difficult to argue that people were being kept in the dark.

The final factor focuses on the nature of negotiations generally. Though all parties may have to compromise their positions to obtain an agreement not all have to compromise equally. The over-arching factor in all negotiations is the relative power of the parties involved. In this case the Government of Canada was by far the more powerful party. Negotiators from all three parties agreed that the federal government held almost all the cards. The Government of Canada had by far the lion's share of the resources (legal and political authority and responsibility, money, expertise, personnel) needed to conduct claims negotiations. The CYI had to borrow its financial resources from the federal government. Perhaps most importantly the federal government had more leverage in terms of timing. The failure to reach an agreement, or to even conduct negotiations at all, would have less impact on the federal government than on either the YFNs or the Yukon government.

Conclusion.

What does this mean for the inherent rights argument as a factor in claims negotiations ?

The provisions of the UFA do not show clear evidence of an inherent rights approach. It could be argued that many of the ideas incorporated into the UFA are derived from the discourse of inherent rights. Yet strong arguments could also be made that such ideas have been incorporated using other philosophical rationales.

Yet even if negotiated agreements do not fully embrace the idea of inherent rights aboriginal peoples are not about to abandon this approach. Nor should they. It was necessary for aboriginal peoples to frame their claims with the discourse of rights in order to combat the 1969 White Paper. That requirement still exists.

Opposition to aboriginal claims in BC attempts to delegitimize those claims. BC Reform Party leader Jack Weisgerber has criticized the recent Nisga'a[579] agreement as providing a "blueprint [that] will permanently cleave us into a nation defined and divided along racial lines." The special status the agreement confers on the Nisga'a, and the type of government it establishes are unjustified because, according to Weisgerber, Canadians rejected these ideas with the Charlottetown Accord.[580]

This kind of opposition requires a strong and coherent response. Over the past 20 years the discourse of aboriginal rights, including inherent aboriginal rights, has formed the basis of that response.

The efforts made by aboriginal peoples since the 1969 White Paper to change the discourse surrounding aboriginal claims have met with a great deal of success. The negotiations in the Yukon, as the practical application of political ideas, indicate the nature, and measure, of this success.

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[579] Hereafter I use the contemporary spelling.

[580] Jack Weisgerber, "Inequities replace inequities", *The Vancouver Sun*, February 14, 1996, A 23. See also Mel Smith, *Our Home Or Native Land ?*; Joe Campbell, "We don't owe today's Indians for yesterday's events", *British Columbia Report*, April 15, 1996, p. 10; Gordon Gibson, "The trouble with the Nisga'a deal", *The Globe and Mail*, February 20, 1996, p. A21; John Power, with notes from Steve Vanagas, "Why no Nisgaa [sic] referendum ?", *British Columbia Report*, April 15, 1996, pp. 8-13; Alex Macdonald, "Don't embed Nisga'a accord in constitutional concrete", *Vancouver Sun*, June 18, 1996.

Throughout the UFA negotiations the Government of Canada insisted that nothing in the agreements constituted explicit recognition of aboriginal rights and title. There are clauses in all agreements to attest to this. Federal negotiators insist that their concern is with the positions that YFN negotiators present to them. From the federal perspective a concession on, for example, self-government (constituting governments under separate legislation rather than the territorial municipal ordinance) was a concession to a demand made at the table and not the acceptance of an underlying philosophical position.

One might be tempted to conclude that Yukon Indians failed somewhat in their negotiations because the UFA does not reflect an inherent rights position more fully. The Government of Canada and the Government of the Yukon have always operated from the position that the principles of Canadian law, not inherent rights, must remain the operative paradigm in regulating relations between aboriginal peoples and government. This has essentially been achieved.

But even though the Government of Canada was successful in keeping the UFA within the bounds of Canadian law it would not be accurate to say that YFNs merely capitulated to government's approach to aboriginal rights. All sides had to compromise in order to obtain an agreement. And while it could be argued that YFNs compromised the most in terms of their substantive positions it is obvious that the Government of Canada and the Government of the Yukon not only compromised their initial philosophical positions but abandoned them completely.

The liberal-individualist perspective outlined in the 1969 White Paper would never have provided for the land, financial compensation, and political rights contained in the UFA. In 1973 the federal government accepted the legitimacy of comprehensive claims. Still, the Government of Canada and the Government of the Yukon viewed the resolution of aboriginal claims as a glorified real-estate transaction. Aboriginal peoples would retain some land, under conventional methods of tenure, and would receive monetary compensation in exchange for their aboriginal rights. Henceforth, aboriginal peoples would become part of the mainstream.

Over time, however, government policy changed to accommodate aboriginal demands. Eventually the insistence on the extinguishment of aboriginal rights and title was dropped. Furthermore every comprehensive claim which has been concluded provides for forms of aboriginal self-government, a concept inimical to the White Paper. While always asserting the primacy of Canadian law the federal government has found ways of accommodating aboriginal legal and political concepts within Canadian law. A similar metamorphosis occurred in the position of the Government of the Yukon.

The shifting of federal and territorial policy illustrates the dynamic relationship between politics and law. Some commentators have criticized the federal government's approach to aboriginal claims because it has accepted provisions that go beyond what the courts have said is strictly necessary.[581] Yet governments are always able to create new laws or modify existing laws, within their areas of jurisdiction and the bounds of the Constitution. In that sense anything government does is "within the laws of Canada" unless ruled *ultra vires* by the Supreme Court.

Yukon Indians, from the beginning, envisioned maintaining their special status and negotiating the establishment of institutional arrangements to facilitate on-going political relationships. Pursuant to their agreements Yukon Indians will not be incorporated into Yukon society as undifferentiated individuals. They will be able to maintain their distinct, collective identities through YFN governments. Their method of holding land constitutes a unique form of title. Even though it is not explicitly recognized as aboriginal title, it is a form of title available only to YFNs. The provisions for Yukon Indian participation on resource management boards also affirms the collective interests of YFNs.

The end result is that many of the demands articulated in *Together Today for our Children Tomorrow* have been achieved. Some of their initial positions have been compromised, because of the practical approach of YFNs, the nature of the principled negotiations process, and the federal government's ability to control that process. However, regardless of the conclusions one might draw regarding specific provisions of the UFA, and whether these provisions recognize aboriginal rights as inherent rights, it is the YFN vision of aboriginal, non-aboriginal relations that has prevailed.

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[581] Mel Smith p. 137.

Perhaps this is why YFNs are largely satisfied with the results of the negotiations. Paul Birckel said that although YFNs did not achieve the level of autonomy they wanted they did "come a long way" and managed to secure "some fairly large concessions from the government side." The nature of the self-government agreements is such that YFN governments can expand their jurisdictions over time (to a maximum specified in the agreements) as their expertise, resources, and desires permit.[582]

This satisfaction is tempered, and may have more to do with having an agreement than the nature of the agreement itself. As Dave Keenan said part of the motivation for negotiation was for YFNs to regain control of their lives. YFNs could have held out longer in the hope of securing more money or authority but the longer they "sit back and argue with The Man...slowly and surely the depletion of our culture, the cultural genocide, and the cultural rape happens."[583] The only way to arrest that trend was to secure an agreement, implement it, and begin exercising control.

Aboriginal peoples will not realize all their demands through negotiated agreements. And these agreements may not recognize aboriginal rights as inherent rights. However it must be recognized that the development, and use, of inherent aboriginal rights discourse has gone hand in hand with a greater willingness on behalf of government to negotiate aboriginal claims and a greater willingness on behalf of the general public to accept such claims.

Furthermore we must recognize that the basis of negotiations and the basis of the agreement which emerges from those negotiations are not necessarily the same thing. These bases would only be the same if all parties to the negotiations adopted the same philosophical perspective or if one were successful in totally vanquishing the others. This did not happen in the UFA negotiations and is unlikely to happen elsewhere.

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[582] Paul Birckel, August 31, 1993.

[583] Dave Keenan, August 5, 1993.

But whatever role inherent aboriginal rights discourse plays at the negotiating table we must realize that for aboriginal peoples the value of inherent aboriginal rights discourse goes beyond that of a negotiating position or as a response to opposition. The development of inherent rights discourse has done two other things as well. Philosophically, it has established itself as a unifying theory of aboriginal rights. Politically, it has served as a unifying force for aboriginal peoples - one which places them in common cause with other aboriginal peoples across Canada and around the world. Aboriginal rights, then, cannot be looked at in a simply instrumental fashion. They are not simply a negotiating device designed to secure material benefits.

Another reason for aboriginal peoples to continue to assert the inherent rights perspective is its philosophical strength. One of the central tenets of inherent rights discourse is that aboriginal societies were established in Canada before the arrival of Europeans - an historical fact which Canadian law and public policy has tended to ignore. Historical priority means that these societies are entitled to a certain set of political, economic, and cultural rights which should only be altered with their consent. To deny this is to assert that somehow European societies, upon their arrival in North America, had as legitimate a claim to North America as those who were already in possession of the land and had been in possession of that land for varying periods of time.

If this were the case it is hard to see how any form of land tenure or political rights could be secure, unless one were prepared to argue that the Europeans somehow possessed rights which were unavailable to aboriginal peoples. Of course such assumptions were the basis of law and policy, especially as Canada was establishing itself in the 19th century. Regardless, current attempts at establishing more equitable relationships between aboriginal peoples and the Canadian state should be based on contemporary views of what is right and just. Neither the Canadian government nor the Canadian public is bound by the mistaken assumptions of our ancestors.

In terms of negotiation, however, aboriginal peoples can not expect the Government of Canada to capitulate to this line of argument. This does not mean that inherent rights discourse is of no instrumental value. However this discourse will have a different effect at the local, as opposed to the national, level.

At the local level the inherent rights approach can underlie an aboriginal nation's negotiating position. This position has to be responded to by government. Through the negotiations process elements of inherent rights can manifest themselves in agreements, even if they are not explicitly recognized. In the UFA negotiations the parties could agree to disagree on the question of the existence of aboriginal title or the inherent nature of aboriginal rights, because they could concentrate on such issues as land quantum, methods of land tenure, amount and type of compensation, and the jurisdictions to be exercised by YFN governments.

The situation becomes more complicated when dealing with issues at the national or constitutional level. At that level negotiations have been inextricably linked to underlying philosophical concepts and different world views. Recognition of aboriginal title, for example, is seen as a denial of underlying Crown title; recognizing aboriginal rights as inherent rights is seen as an affront to the idea of Crown sovereignty.

Whether this is necessarily the case or whether this is a problem with the approach taken thus far is unclear. It must be kept in mind that national level aboriginal organizations can only negotiate these issues at a rather abstract level because aboriginal nations insist on negotiating land claims and self-government agreements at the local level. For these reasons agreements like the UFA have been signed at the local level while agreement at the national level remains elusive.

This is not to say that no progress has been made at the constitutional level. As mentioned in Chapter Five aboriginal political issues have gained prominence and acceptance nationally. And although agreement has not been reached at the constitutional level, negotiation at that level, and the discussion and research it has provoked, have influenced negotiations at the local level.

Perhaps this is the role constitutional negotiations are to play in the realm of aboriginal claims, at least for the foreseeable future. Like aboriginal rights discourse itself this role has more to do with the context of local negotiations than the substance of those negotiations.

It is sometimes assumed that agreement must be made at the abstract level (What is aboriginal title ? Are aboriginal rights inherent rights ?) before agreement can be made at the practical level. This does not seem to be the case with aboriginal claims. Perhaps once more agreements are concluded and implemented locally a more cohesive picture of aboriginal rights and title will be allowed to emerge. The Canadian public may be reassured that inherent aboriginal rights do not pose a threat to Canadian federalism. At that point constitutional agreement may be possible.

The logic of this argument can be extended to other issues in Canadian politics where philosophical disagreements prevent the development of solutions. The debate over Quebec as a distinct society is a case in point. One could argue that one reason why distinct society, and its many variants, remains unacceptable to many Canadians is that it is not clear what practical effect it will have should it be included in the Canadian constitution. Perhaps it would be possible to achieve an agreement on this point if discussions on distinct society could be focused on practical issues: the powers the Government of Quebec might gain and how this would affect Quebec's relationship with the federal government and the provincial and territorial governments.

As Tim McTiernan pointed out with regard to self-government negotiations the "essential issue" that aboriginal and government negotiators face is "how to frame the question in a manner that will produce a solution that works."[584] The same is true of the distinct society debate. The sociological fact of Quebec's distinctiveness is not the issue. The issue is how to, or even if we can or should, translate that sociological fact into a political reality. Regardless, as long as the issue of Quebec as a distinct society remains framed in the abstract its critics will have free reign to conjure up many and varied worst case scenarios, thereby jeopardizing any hope of agreement.

The Future of Inherent Aboriginal Rights.

The issue of inherent aboriginal rights re-emerged on the national stage with the issuance of a new federal self-government policy guide in August 1995. In this policy guide the Government of Canada revealed its intention to recognize "the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982.*" The policy guide focuses on "reaching practical and workable agreements...rather than trying to define [the inherent right] in abstract terms."[585] The Government realizes that "there are different views about the nature, scope and content of the inherent right."[586] Therefore "implementation of the inherent right cannot be uniform" across Canada.[587]

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[584] Tim McTiernan, July 27, 1993.

While eschewing a definition of the inherent right of self-government the Government of Canada does have a position on the content of the right. It is to "operate within the framework of the Canadian Constitution" - this includes the application of the *Charter of Rights and Freedoms* - and "does not include a right of sovereignty in the international law sense."[588] The policy guide also outlines a proposed scope of negotiations, in terms of jurisdictions to be exercised by aboriginal governments, mechanisms for implementation, and process issues.

Though it remains unclear as to what this policy will mean for the Yukon, two points can be made about it. First, from a philosophical perspective the policy guide does not articulate the right of self-government as an inherent right, either by the meaning given by aboriginal authors or by the more economical approach advocated in this thesis. The document is silent with regard to the historical dimension of the inherent right of self-government and the right in principle. As a matter of practice the federal government lays down so many conditions on the content and exercise of the right that the right cannot be anything but contingent.

The second point that can be made about this policy is that it is unclear what lasting legal effect it will have. Without a constitutional amendment the policy is not binding on future federal governments. Therefore this action does not provide the security which aboriginal peoples desire for their self-government agreements.

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[585] Canada, *Aboriginal Self-Government...*, p. 1.

[586] Canada, *Aboriginal Self-Government...*, p. 3

[587] Canada, *Aboriginal Self-Government...*, p. 4.

[588] Canada, *Aboriginal Self-Government...*, p. 3 and p. 4.

If the 1995 Self-Government policy guide is any indication the federal government will probably adopt, nationally, an approach to self-government that is similar to that taken in the Yukon. That is, the federal government will seek to maintain the supremacy of Crown sovereignty while steering the negotiations in practical directions. Whether this tactic will be successful or not will depend to a large extent on the reaction of aboriginal peoples in other parts of the country.

Recently the Government of Canada, and the Government of BC, concluded a comprehensive claims agreement with the Nisga'a. This is significant because BC is where the comprehensive claims debate will likely reach its zenith. In many ways the agreement is similar to the agreements signed in the Yukon: the focus is on land, financial compensation, and self-government. Highlights of the deal include:

> Compensation: $ 211.5 million.
>
> Land: The Nisga'a will retain 1,930 square kilometres of their traditional territory in the Nass Valley, plus ownership of 18 reserves outside their traditional territory and 15 other small parcels of land. This includes surface and subsurface rights.
>
> Self-Government: some jurisdiction over culture and language, lands, public order, employment, public works, traffic and transportation, marriages, social services, health services, adoption, child and family services, education, child custody, gambling, liquor, wills, justice, taxation, environment, fisheries, wildlife, and resources.
>
> Harvesting Rights: a guaranteed percentage of the Nass River salmon fishery, priority rights with regard to harvesting wildlife, rights to harvest timber outside the settlement area.[589]

However the similarity between the Nisga'a agreement and those reached in the Yukon does not mean that the process followed in other parts of BC will be similar.

The similarity between the Nisga'a agreement and those negotiated in the Yukon is probably due to the fact that the situation of the Nisga'a bears similarities to that of YFNs. The Nass Valley is a relatively remote area, 1,300 kilometres northwest of

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[589] "The Nisga'a Deal"; Mark Hume, "Angry fishers denounce deal"; and Mark Hume, "Indian hunters stand to get guaranteed share of all moose, bear, goats shot in Nass Valley, *The Vancouver Sun*, February 16, 1996, B3.

Vancouver. It remains to be seen what agreements will look like once negotiations shift to more populated areas.

And while the deal has been hailed by the parties to the agreement and others it has also come in for severe criticism from representatives of third-party interests and opposition politicians.

Given the importance of commercial fishing in BC it is not surprising that some of the harshest criticism has been reserved for the guarantee of a certain portion of the salmon catch to the Nisga'a. Phillip Eidsvik, of the BC Fisheries Survival Coalition, denounced the fisheries provisions as a "complete betrayal of the commercial fishery."[590] His views have been echoed by Michael Hunter, president of the Fisheries Council of BC; BC Liberal leader Gordon Campbell; BC Reform Party leader Jack Weisgerber; Douglas Walker, director of the BC Wildlife Federation;[591] Dennis Brown, vice-president, United Fishermen and Allied Workers' Union;[592] and John Cummings, Reform MP, Delta.[593] Opposition has also been expressed regarding the guaranteed access to timber.[594]

While Yukon negotiators were able to use *Sparrow* to legitimize their agreement in the eyes of many Yukoners, it is not clear that negotiators in BC will have similar luck with a recent Supreme Court of Canada decision. In *Van der Peet* the Supreme Court of Canada ruled that the right of aboriginal peoples to fish commercially is not a constitutionally protected right. The court allowed that a commercial fishing right could exist. However the existence of this right, as an aboriginal right, had to be proved. The Court established criteria for identifying an aboriginal right.[595]

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[590] Ross Howard, "B.C. land-claim deal sails into storm", *The Globe and Mail*, February 16, 1996, p. A5.

[591] Howard p. A5.

[592] Dennis Brown, "B.C. fishers object to paying disproportionate price", *The Vancouver Sun*, February 24, 1996, A 23.

[593] John Cummings, "This is the first step to fish-management balkanization", *The Vancouver Sun*, February 24, 1996, A23.

[594] Gordon Hamilton, "Forest firms stand to lose loads of logs with treaty", *The Vancouver Sun*, February 24, 1996, C5.

In order for a right to be an aboriginal right "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[596] Not only did the court assume for itself the right to determine if a practice were "integral to the distinctive culture of the aboriginal group claiming the right" it also ruled that while "[t]he court must take into account the perspective of the aboriginal peoples...that perspective must be framed in terms recognizable to the Canadian legal and constitutional structure."[597]

As with *Sparrow* the decision could be of some utility in the context of claims negotiations. However the existence of this criterion, like that of *Sparrow*, emphasizes the fact that whatever commercial fishing right emerges will not be an inherent right, but a contractual right based on a negotiated agreement and bounded by Canadian law.

The criticism by third parties would not come as a surprise to those who negotiated the UFA. Negotiators from all three parties in the Yukon indicated that the biggest difference between negotiations in the Yukon and BC would be the issue of third party interests. In the Yukon the negotiating parties were, for the most part, able to leave third party interests alone. This won't be possible in BC. Third party interests in BC are pervasive, powerful, and long established. The issue to be dealt with will be the balancing of claims between those currently exercising rights over certain lands and resources versus those who were unjustly displaced from those lands and therefore lost access to those resources. If the Nisga'a agreement is any indication, and I believe it is, this will be a contentious issue throughout BC.

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[595] Rudy Platiel and Ross Howard, "Indians don't have right to sell catch, court rules", *The Globe and Mail*, August 22, 1996, p. A1 and A16.

[596] "How to identify an aboriginal right", excerpted from the majority ruling of the Supreme Court of Canada, *The Globe and Mail*, August 23, 1996, p. A17.

[597] *Globe and Mail*, "How to identify an aboriginal right", p. A17.

Given the number of agreements to be signed in BC, and the volatility of the issues involved, the parties to the negotiations will have to develop strategies to deal with opposition and assure the public of the justice of the agreements. In the end the Government of Canada, the Government of BC, and BC First Nations may find that, as difficult as negotiations will be, that this will be their greatest task.

In my view this task can be made easier if the parties use aboriginal rights discourse, including inherent rights discourse, to legitimize aboriginal claims and generate support for the agreements reached. Barry Stuart indicated that a large number of Yukoners were prepared to support the UFA negotiations once they were made aware of the legal basis of YFN claims. I believe that this approach can work elsewhere.

Those who oppose aboriginal claims invariably point out that Canadian democracy is founded on the idea of equality, especially individual equality, and that the recognition of aboriginal rights promotes inequality. However Canadian democracy is also founded on the rule of law, as such the legal obligations which the Government of Canada has regarding aboriginal rights have to be fulfilled.

The legal basis of aboriginal claims must be asserted. However legal rights only ascribe the bare minimum in terms of fulfilling obligations. Canadian law may require that the Government of Canada sign treaties with aboriginal nations but does not prescribe the nature of the relationship which should emerge from those negotiations. This is where moral and inherent rights arguments can play a role. They can help shape the agreements that emerge from negotiations by tying the aspirations of aboriginal nations regarding their relationship to the Canadian state with entitlements.

And entitlement is the key. Given the costly and wide-ranging nature of claims settlements the Canadian public is unlikely to support their resolution unless it can be made aware that aboriginal peoples are entitled to what they are claiming. If aboriginal nations are allowed to be portrayed, as the opponents of claims settlements portray them, as special interest groups who are only seeking to acquire material benefits for their members at the expense of the general public, there will be no public support. Without public support it will be politically difficult, if not impossible, for governments to negotiate agreements, regardless of their own philosophical positions on aboriginal claims.[598]

Final Thoughts on the Inherent Rights Approach.

The debate over aboriginal rights and the negotiation of aboriginal claims is not merely a philosophical exercise. At stake are the individual and collective welfare of aboriginal peoples and the notion of Canada as a just society. The nature of the relationship between aboriginal peoples and the Canadian state must be negotiated between them. If aboriginal peoples have a hand in determining their futures and are able to negotiate agreements that satisfy them then the results will be worth supporting, regardless of the philosophical approach, or approaches, which underlie them. Improvements must be made to the living conditions of aboriginal people and these improvements can only come about when they gain greater individual and collective control over their own futures. Still such agreements at the local and national level should do more than provide material benefits. Agreements must confirm the collective rights and identities of aboriginal peoples and affirm their status in the Canadian federation as the original occupants of Canada.

An Agenda for Further Research.

I do not mean to suggest that this thesis is the last word on aboriginal rights generally, or the inherent rights approach specifically. However based on my review of the literature and the interviews I conducted I believe that the areas that would benefit most from further research are: negotiations processes, and the implementation of agreements.

As mentioned above the Government of Canada has made its policy pronouncement on the inherent aboriginal right of self-government. Whatever its drawbacks this policy, and therefore the status of aboriginal rights, is not likely to change as long as the constitutional situation remains as it is. And if the Supreme Court of

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[598] See, for example, Vaughn Palmer, "Clark unlikely to brook a Nisga'a deal he couldn't sell to voters", *Vancouver Sun*, January 26, 1996, p. A14; Justine Hunter, "Pact will be renegotiated if unpopular, NDP says", *Vancouver Sun*, February 15, 1996.

Canada's decision in *Van der Peet* is any indication the prospect that the courts will expand the definition of aboriginal rights also seems to be dimming.

Perhaps the most compelling reason to focus research efforts elsewhere is the conclusion of this thesis: that arguments about aboriginal rights form part of the context in which negotiations take place but other factors, including the negotiations process itself, are equally, if not more important. In the current political environment rights arguments are most important as a means of legitimizing aboriginal claims in the mind of the general public. This, in turn, should generate public support for negotiations and agreements. However an incremental clarification of aboriginal rights, as recently provided by the SCC, is not likely to alter the legal and political context to any great degree.

Another reason to focus on negotiations processes and implementation is the relative lack of literature on those subjects. Cassidy and Bish,[599] and Pocklington[600] have examined functioning aboriginal governments. But for the most part the literature on aboriginal rights, land claims, and self-government deals with the issues at an abstract or general level. Much of it is devoted to the justification of aboriginal claims or in exposing the faults in government policy. Few authors have tried to explain what goes on once the negotiations start.

Case studies in this area would probably prove useful to those involved in negotiations. Tony Penikett read much of the academic material available at the time of the UFA negotiations but said that it "wasn't very helpful to us in dealing with particular problems, particular issues in this very bicultural setting."[601] This gap could be filled by researchers who were willing to grapple with the detail questions which face political leaders and negotiators.

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[599] Frank Cassidy and Robert L. Bish, *Indian Government: Its Meaning in Practice*. Oolichan Books and the Institute for Research on Public Policy. Lantzville, BC and Halifax. 1989.

[600] Pocklington, *The Government and Politics of the Alberta Metis Settlements*.

[601] Tony Penikett, July 28, 1993.

A similar comment can be made regarding implementation. So far little research has been done to determine what goes on between the signing of agreements and their implementation: what conflicts arise, how those conflicts are dealt with, and how those conflicts may have been avoided. Cassidy's ***Aboriginal Self-Determination*** contains a section entitled "Implementation: How Will First Nations Government Happen ?". The section is a useful introduction to anyone who would wish to study implementation. However given the nature of the book, and the nature of the subject, it does not deal with the subject thoroughly. Another study is Wendy Moss' examination of the James Bay and Northern Quebec Agreement.[602] Moss provides a useful model for studying implementation albeit from a legal perspective. The problem is not with the work done by Cassidy and Moss but rather the fact that they are almost alone in the field.

It should not be assumed that the study of negotiations processes and the implementation of negotiated agreements are straightforward matters of law and public administration. As demonstrated above negotiations processes are greatly affected by the power relationships between the parties. Furthermore different negotiations processes can serve to accentuate or diminish the differences in power between the parties to the negotiations.

As a result there are many political questions which could be investigated with regards to negotiations processes. Many of the negotiators I interviewed indicated that the parties got a long way towards implementing a principled negotiations process, but they did not get all the way. Could the negotiators in the Yukon have gone further in implementing this approach ? Might negotiators elsewhere be able to go further ? Would it be advisable to go further ?

The same is true of the implementation of agreements. One of the primary concerns of YFNs is ensuring that their agreements are implemented in a way that honours both the letter and intent of those agreements. As Dave Keenan told me in August 1993

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[602] Wendy Moss, "The Implementation of the James Bay and Northern Quebec Agreement", in Bradford W. Morse (ed.), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*. Carleton University Press. Ottawa. 1991. pp. 684-694.

> As I speak here, without my agreements being legislated, my dear friends the bureaucrats...[are] doing their utmost to define what they think the agreements mean.[603]

If the meaning given to the agreements by federal civil servants is different than the understanding YFNs have of their agreements conflict will ensue. The resolution of this conflict would be a political exercise.

Such issues are important. For while rights, judicial decisions, and political power are among the factors which affect the outcome of negotiations the real issue in implementing agreements, as Dave Keenan pointed out, is trust. Aboriginal peoples do not trust Canadian governments because historically these governments have violated their rights, and acted against their interests. If negotiated agreements are not implemented faithfully they will be considered one more broken promise and the level of distrust will grow. And if the reaching of agreements does not foster a greater feeling of trust between aboriginal and non-aboriginal peoples in Canada an historic opportunity will be lost.

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[603] Dave Keenan, August 5, 1993.

Sources

Published Books and Articles page 201
Unpublished Materials page 209
Court Cases Cited page 209
Government Documents page 209
Council for Yukon Indians Documents page 211
Agreements page 211
Land Claims Secretariat files page 212
Personal Interviews page 215
Video Recordings page 217

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LC87-161 Copy of 1979 Memorandum of Understanding and amending letter respecting the Yukon Indian Land Claim Process.

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LC87-318 volume 1 Issues relevant to land selection by the Teslin Indian Band

LC87-322 Histories, Summaries, Overviews, Updates relevant to Yukon Indian Land Claims

LC87-324 Public Information Series

LC87-333 "Together Today for our Children Tomorrow"- A Statement of Grievances and an Approach to Settlement by the Yukon Indian People (January 1973)

LC87-334 Yukon Indian Land Claims Analysis and/or Position Papers (prepared by the Government of Canada)

LC87-339 Copy of the 1985 Memorandum of Understanding respecting the Yukon Indian Land Claim process.

LC87-343 Government of Yukon Submission to the Federal Task Force to Review Comprehensive Native Claims Policy

LC87-344 Council for Yukon Indians Submission to the Federal Task Force on the review of Comprehensive Land Claims

LC87-345 Yukon Territory Progressive Conservative Party Submission to the Federal Task Force to Review Comprehensive Claims Policy (September 27, 1985)

LC87-347 Joint Statement (Draft) by Government Leaders of Yukon and Northwest Territories on Federal Land Claims policy (June 1986)

LC87-349 Yukon Government Response to the Report of the Task Force to Review Native Claims Policy- Background Papers and Final Draft (May 20, 1986)

LC87-351 Copy of the 1986 Letter of Understanding respecting the 1985 Memorandum of Understanding

LC87-390 The First Nations: Report on the Self-Government Bill (Bill C-52)

LC87-391 Response of the Government to the Report of the Special Committee on Indian

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LC87-461 Memorandum of Agreement between the Council for Yukon Indians and the Inuvialuit respecting certain rights in North Yukon (March 15, 1984)

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LC87-651 "Analysis of Canada's Comprehensive Claims Policy". Assembly of First Nations. (1987).

LC87-661 Draft Land Claims Negotiations Resolutions for Council for Yukon Indians General Assembly (May 1987)

LC87-663 Notes for an address by the Government Leader to the Council for Yukon Indians General Assembly (July 1987)

LC87-687 "Canada's Eleventh Province ? Constitutional and Political Development of Yukon" H. Shayne Fairman (Honour's Thesis) Queen's University, Kingston, Ontario (April 1985)

LC87-693 Yukon Land Claims Process and Structure (Yukon Government Land Claims Secretariat February 1986)

LC87-697 An Opinion Prepared for the Council for Yukon Indians and Kaska Dena Council by Thomas R. Berger (June 1986)

LC87-726 Land Availability in the Teslin Area

LC87-747 COPE: Final Agreement (June 5, 1984) Summary of Impact on Yukon.

LC87-752 Procedures for agreements reached at the table - Proposals 1987

LC87-764 Aboriginal Rights

LC87-784 Economic Development and Land Claims - Discussion papers 1987

LC88-825 Native Fishing Rights Panel Discussion (February 1988)

LC88-832 "Getting to Yes" Seminar, February 1988 (Interim Land Claims Secretariat

LC88-859 Council for Yukon Indians meeting with Government Leader Penikett (May 4, 1988)

LC88-860 Legal Basis for Yukon Land Claim

Personal Interviews

At the time of his interview **Shakir Alwarid** was coordinator for the Kwanlin Dun First Nation and occasional advisor to the CYI. He was Deputy Minister of the LCS and Chief Negotiator for the Government of the Yukon from December 1991 to November 1992. He was interviewed July 30, 1993 at the offices of the Kwanlin Dun First Nation in Whitehorse.

Karyn Armour has worked for the LCS since 1987 as a researcher, and land negotiator. She is currently Associate Chief Negotiator for the LCS. She was interviewed August 10, 1993 at the LCS office, Whitehorse.

Paul Birckel has been Chief of the Champagne-Aishihik First Nations since 1981. From 1975-1981 he was coordinator for the CYI. He was interviewed August 31, 1993 at the offices of Rainbow Business Services Ltd. in Whitehorse.

Margaret (Joe) Commodore was an NDP MLA from 1982-1996, and a cabinet minister from 1985-1992. She was a vice-president of YANSI from 1973-1980. She was interviewed August 17, 1993 in the NDP Legislative Offices in the Yukon Government building, Whitehorse.

Dave Keenan's direct involvement in the negotiations began in 1986 as a researcher and negotiator for the Teslin Tlingit Council and researcher for the CYI. He was Chief of the TTC from 1988-1995, and vice-chief of the Council of Yukon First Nations from 1995-1996. He was elected to the Yukon Legislative Assembly on September 30, 1996. He was interviewed August 5, 1993 at the TTC Offices, Teslin, Yukon.

Tim Keopke has been Associate Chief Federal Negotiator for the CYI claim since 1987. He had previously worked for the LCS as an assistant negotiator. He was interviewed July 27, 1993, August 23, 1993 and April 10, 1994 at the Federal land claims office, Whitehorse, Yukon.

Ken McKinnon was Commissioner of the Yukon from 1986-1995. He served as a Territorial Councillor from 1961-1964 and from 1967-1978. He also served on the Executive Committee and was the first member of Territorial Council to sit at the land claims negotiations table. He was interviewed July 27, 1993 in the Commissioner's Office, Whitehorse.

Audrey McLaughlin has been MP for the Yukon since 1987. She was leader of the federal NDP from 1989-1995. She was interviewed August 22, 1993 by phone in Whitehorse.

Tim McTiernan's involvement with claims negotiations began in 1986. He has been a negotiator since 1988 and Chief Negotiator for the Government of the Yukon since October 1992. He was interviewed July 19, 1993, July 27, 1993 and April 7, 1994 in the Executive Council Offices, Yukon Government building, Whitehorse.

At the time of his interview **Victor Mitander** was Chief Negotiator for the CYI, and had been since 1985. From 1979-1984 he was involved in negotiating the AIP. He was interviewed September 1, 1993 at the CYI offices in the Yukon Indian Centre, Whitehorse.

Erik Nielsen was MP for the Yukon from 1957-1987. He was a cabinet minister from 1979-1980 and from 1984-1987. He was interviewed August 25, 1993 at the Yukon Archives in Whitehorse.

Arthur M. Pearson served as Commissioner of the Yukon Territory 1976-1978. He was the last Commissioner to directly participate in land claims negotiations. He was interviewed July 29, 1993 in Whitehorse.

Tony Penikett was an MLA and leader of the Yukon NDP from 1978-1995. He was Government Leader of the Yukon from 1985-1992. During that time he was also minister responsible for the land claims negotiations. He was interviewed July 28, 1993 in the

NDP Legislative Offices, Yukon Government building, Whitehorse.

James Smith was Commissioner for the Yukon from 1966-1976. In this capacity he represented the Yukon at the land claims table from 1973-1976. He represented Whitehorse West on the Territorial Council from 1958-1961. He was interviewed August 30, 1993 at his home in Whitehorse.

Gordon Steele was Principle Secretary to the Government Leader, from 1982-1985 and from 1992-1996. He was Administrator of the LCS from 1975-1982 and was directly involved in the land claims negotiations during most of this period. He was interviewed July 29, 1993 in the Executive Council Office, Yukon Government building, Whitehorse.

Barry Stuart is a judge of the Yukon Territorial Court. He was chief judge of the court before serving as Chief Negotiator for the Government of the Yukon from 1985-1989. He has taught law at Dalhousie University and Osgoode Hall. He was interviewed August 17, 1993 and April 11, 1994 in his chambers in the Andrew A. Philipsen Law Centre, Whitehorse.

Video Recordings

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